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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

DAVID W. MURRAY, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATES OF HIS MINOR CHILDREN, DESAREA MURRAY, DAVID W. MURRAY, JR., AND DARRYL SCOTT MURRAY, AND SALLY W. MURRAY
Petitioners

versus

ANTHONY J. BERTUCCI CONSTRUCTION CO., INC., THE M/V BARBARA ANN, AND PACIFIC EMPLOYERS INSURANCE COMPANY
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

QUESTION NUMBER 1

DID THE COURT OF APPEALS ERR IN DENYING SALLY MURRAY DAMAGES FOR LOSS OF CONSORTIUM BY FAILING TO FOLLOW THE CASE OF *AMERICAN EXPORT LINES, INC. V. ALVEZ*, 446 U.S. 274 (1980)?

QUESTION NUMBER 2

DOES THE CASE OF *MILES V. APEX MARINE CORP.*, ___ U.S. ___, 111 S.CT. 317, 112 L.ED.2D 275 (1990) OVERRULE THE CASES OF *AMERICAN EXPORT LINES, INC. V. ALVEZ*, 446 U.S. 274 (1980) AND *CRUZ V. HENDY INTERNATIONAL COMPANY*, 638 F.2D 719 (5TH CIR. 1981) AND DENY A CLAIM FOR LOSS OF CONSORTIUM UNDER THE GENERAL MARITIME LAW TO A WIFE WHOSE HUSBAND IS INJURED, BUT NOT KILLED, IN A MARITIME SETTING ON LOUISIANA TERRITORIAL WATERS?

QUESTION NUMBER 3

DID THE COURT OF APPEAL ERR IN DENYING THE MINOR CHILDREN, DESAREA MURRAY, DAVID W. MURRAY, JR. AND DARRYL MURRAY, DAMAGES FOR THE LOSS OF CONSORTIUM, COMPANIONSHIP, SOCIETY AND SERVICES OF THEIR FATHER, AWARDED BY THE JURY AT TRIAL ON THE MERITS?

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STATEMENT OF JURISDICTION

Petitioners[1] seek review by way of a Petition for Writ of Certiorari to a decision rendered by the United States Court of Appeals for the Fifth Circuit on April 16, 1992.

Jurisdiction of this Honorable Court is invoked under the provisions of 28 U.S.C. § 1254(1) and Rules 10 through 16 of the Rules of the Supreme Court of the United States.

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[1] Plaintiffs-Appellants in the Court of Appeals were David W. Murray, Individually and as Administrator of the Estates of His Minor Children, Desarea Murray, David W. Murray, Jr. and Darryl Scott Murray; and Sally W. Murray. Defendants-Appellees and Cross-Appellants were Anthony J. Bertucci Construction Co., Inc. and Pacific Employers Insurance Company, insurer of Anthony J. Bertucci Construction Co., Inc.

STATUTES APPLICABLE TO THIS CASE

§ 688. Recovery for injury to or death of seaman

(a) Application of railway employee statutes; jurisdiction

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. * * *

Jones Act, 46 U.S.C. § 688(a)

Art. 2315. Liability for acts causing damages

Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.

Damages may include loss of consortium, service, and society, and shall be recoverable by the same respective categories of persons who would have had a cause of action for wrongful death of an injured person.

Louisiana Civil Code Article 2315

Art. 2315.5. Wrongful death action; exception

Notwithstanding any other provision of law to the contrary, the surviving spouse of a deceased, who has been convicted of a crime involving the intentional killing or attempted killing of the deceased, or, if not convicted, who has been judicially determined to have participated in the intentional,

unjustified killing or attempted killing of the deceased, shall not be entitled to any damages or proceeds in an action for wrongful death of the deceased or to any proceeds distributed in settlement of a cause of action for such wrongful death. In such case, the child or children of the deceased, or if the deceased left no child surviving, the other survivors enumerated in Article 2315.2(A)[2], in order of preference stated, may bring an action against such surviving spouse for the wrongful death of the deceased.

An executive pardon shall not restore the surviving spouse's right to any damages or proceeds in an action for wrongful death of the deceased.

Louisiana Civil Code Article 2315.5

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[2] **Art. 2315.2. Wrongful death action.**

A. If a person dies due to the fault of another, suit may be brought by the following persons to recover damages which they sustained as a result of the death:

(1) The surviving spouse and child or children of the deceased, or either the spouse or the child or children;

(2) The surviving father and mother of the deceased, or either of them if he left no spouse or child surviving; and

(3) The surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child or parent surviving.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in Courts Below.

On October 7, 1987, plaintiff David W. Murray was and had for some time been employed by defendant, Anthony J. Bertucci Construction Company, Inc. (hereafter simply "Bertucci") as a deckhand on the tug M/V BARBARA ANN, owned by Bertucci. On that date while the BARBARA ANN and its crew were on the Mississippi River in Louisiana, he was catastrophically injured when he fell on rock which had collected on a spud barge also owned by Bertucci.

Suit was filed on January 8, 1988, on behalf of David Murray individually, against Bertucci under the provisions of the Jones Act, 46 U.S.C. § 688, et seq., and the General Maritime Law, Article III, § 2, United States Constitution. On May 23, 1988, plaintiff amended his suit to substitute Pacific Employers Insurance Company for the unknown insurer named in his original complaint. On September 13, 1988, plaintiff amended his suit a second time to add his wife, Sally W. Murray, as a plaintiff to assert a claim for loss of consortium with her husband as a result of the personal injuries he suffered in the accident. On February 14, 1990, plaintiffs again amended their complaint to add the Murrays' minor children, represented by their father, as plaintiffs to assert loss of consortium claims on behalf of these minors as a result of their father's personal injuries.

This matter proceeded to jury trial on September 4, 1990. On September 11, 1990, the jury rendered a verdict in favor of plaintiffs and against defendants, finding Bertucci negligent and its vessel unseaworthy, and awarding David Murray damages totalling $662,800; Sally Murray damages for loss of consortium in the amount of $175,000; and each of the three minor Murray children $37,500 in damages for their loss of consortium claims. Just prior to the jury's return to the courtroom to announce its verdict, the Trial Court granted

defendants' motion to strike plaintiffs' claims for the loss of consortium awards for the minor children. *Murray v. Anthony J. Bertucci Construction Co., Inc.*, 745 F.Supp. 373 (E.D. La. 1990). The Trial Court signed Judgment in accordance with the jury's verdict and its ruling on the minors' loss of consortium awards on November 6, 1990, and Judgment was entered on November 7, 1990 (see Appendix "A").

On November 19, 1990, defendants filed a motion for new trial only on the issue of the *amount* of the award given by the jury to Sally Murray for her loss of consortium with her husband. The trial court denied that motion on December 11, 1990.

Plaintiffs timely filed their notice of appeal on January 8, 1991, and on January 18, 1991, filed their statement of issues to be presented on appeal. Defendants timely filed their notice of cross-appeal on January 9, 1991, and on January 15, 1991 filed the first of their two statements of issues to be presented on appeal.

After briefing by the parties and oral argument, the Court of Appeals took the matter under advisement. On April 16, 1992, it rendered its decision. After deciding that it would consider the question of Mrs. Murray's right to loss of consortium damages in the appeals court, even though this issue had not been raised by defendants in the trial court, the Court denied Sally Murray her right to loss of consortium damages, holding that notwithstanding *American Export Lines, Inc. v. Alvez*, 446 U.S. 274 (1980); *Miles v. Apex Marine Corp.*, ___ U.S. ___, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990) bars the spouse of an injured seaman from recovering for loss of society and reversed the jury verdict on this point; held that the *Miles* decision should be applied retroactively; and affirmed the trial court's denial of loss of consortium damages to David Murray's minor children. *Murray v. Anthony J. Bertucci Construction Co., Inc.*, 958 F.2d 127 (5th Cir. 1992).

B. Statement of Facts.

On October 7, 1987, David Murray suffered crippling physical and mental injuries as a result of the unseaworthiness of defendant's vessel. Neither the finding of unseaworthiness nor the amount of the award in favor of David Murray was disputed on appeal. Nonetheless, an understanding of the extent of David Murray's injuries is important to a full appreciation of its effect on the Murray family and the resulting loss and damage suffered by Sally and the children. After the accident, David Murray suffered pain in his lower back and pain and numbness in his left leg which ultimately led to hospitalization and surgery to decompress the nerves and to fuse his spine. While he was hospitalized, David's bowel and bladder functions ceased.

Unfortunately, the surgery was not successful. David is still required to take medication and use suppositories and enemas to encourage his bowels to normal movement. David's back hurts him severely when he walks, and he must sit at an angle because his back hurts if he sits straight. He cannot dress himself without assistance. He cannot attain and sustain an erection, and his sexual relations with his wife, which he and Sally described as full and very loving, are now totally gone from his life and Sally's. As a result of his constant pain and disability, he became depressed and is under treatment by a psychiatrist for his depression.

David Murray has lost normal family relationships; he cannot play with his children and engage in family activities he used to engage in, and he cannot have sexual relations with his wife. In sum, the effect of David's physical and psychological injuries on himself and his family has been catastrophic.

ARGUMENT

A. The Court of Appeals Erred in Denying Sally Murray Damages for Loss of Consortium Because Miles v. Apex Marine Corp., supra, Does Not Overrule American Export Lines, Inc. v. Alvez, supra,Explicitly or Implicitly and the Wife of an Injured Plaintiff in a General Maritime Case is Entitled to Damages for Loss of Consortium.

In *American Export Lines, Inc. v. Alvez, supra*, this Honorable Court recognized the right of the spouse of an injured worker suing under the general maritime law to recover loss of consortium damages. In *Cruz v. Hendy International Co.*, 638 F.2d 719 (5th Cir. 1981), the Fifth Circuit Court of Appeals applied the rule specifically to the spouse of an injured seaman entitled to recover under the general maritime law. This rule was consistently followed thereafter. See e.g., *Beltia v. Sidney Torres Marine Transport, Inc.*, 701 F.2d 491 (5th Cir. 1983); *Madore v. Ingram Tankships, Inc.*, 732 F.2d 475 (5th Cir. 1984).

In *Miles v. Apex Marine Corp., supra*, this Court, in a marine *wrongful death* action, ruled that a non-dependent parent of a fatally injured seaman does not have the right to recover damages for loss of society. The Fifth Circuit in the case *sub judice* held that *Miles* should be extended to maritime cases where wrongful death is not involved and, in effect, overruled this Court's decision in *Alvez, supra*. This holding is wrong because it conflicts with a direct and specific holding of this Court in *Alvez* and fails to recognize the fundamental historical and substantive differences between a maritime wrongful *death* action and a general maritime *injury* case which differences make the extension of *Miles* to the latter inappropriate and unwarranted.

In *Alvez*, the defendant ship owner, like the defendant in the case at bar, argued against the general maritime law's remedy for spousal loss of consortium by inviting the Court to

analogize that remedy to those afforded by the Death on the High Seas Act (46 U.S.C. Section 761, *et seq.*) and the Jones Act (46 U.S.C. Section 688). In *Alvez*, however, the Court declined the defendant's invitation to analogize a general maritime law remedy in a case involving a non-fatal injury to a statutory wrongful death remedy. Considering both DOHSA and the Jones Act, the *Alvez* Court held that "neither statute embodies an 'established and inflexible' rule here foreclosing recognition of a claim for loss of society by judicially crafted general maritime law." Id. at 282 [quoting *Moragne v. State Marine Lines, Inc.*, 398 U.S. 375, 387 (1970); quoting *The Seagull*, 21 F.CS. 909, 910 (C.C.D. MD. 1865) (No. 12,578)].

With respect to DOHSA, the *Alvez* Court held that "DOHSA comprehends relief for *fatal* injuries incurred on the *high seas*, ..." at id. 282 (emphasis by the Court). Although the *Alvez* Court recognized that in *Mobil Oil Corporation v. Higginbotham*, 436 U.S. 618 (1978), DOHSA was construed to prohibit the general maritime law from supplementing the elements of compensation specified by DOHSA for high seas wrongful deaths, the *Alvez* Court stated clearly that "*Higginbotham* never intimated that the preclusive affect of DOHSA extends beyond the statute's ambit." *Alvez*, 446 U.S at 282. The *Alvez* Court also stated that it did not "read the Jones Act as sweeping aside general maritime law remedies." *Id.* The Court found that the Jones Act does not "regulate longshoremen's remedies." *Id.* at 283. The Court also noted that "the Jones Act lacks such preclusive effect even with respect to true seaman..." *Id.*

The Court of Appeals in the present case, however, refused to follow the clear mandate of *Alvez* and held instead that this Court's decision in *Miles v. Apex Marine Corp.*, *supra*, implicitly overruled *Alvez* and its progeny. This is simply not so. In *Miles*, the Court addressed a *wrongful death* case in which a non-dependent parent of a seaman who died from injuries suffered aboard defendant's vessel sought to recover under the general maritime law for her loss of society. This Court

reviewed its jurisprudence on maritime wrongful death and noted that certain "legislative enactments" existed "for policy guidance." 112 L.Ed. at 287. The Court premised its analysis of the issue before it on the principle that "an admiralty court must be vigilant not to overstep the well considered boundaries imposed by federal legislation." *Id.*

Yet, having said this, this Court specifically declined to limit *Moragne* to its facts, noting that if that were the case, a seaman would not have a general maritime law cause of action for wrongful death. *Id.* at 287-288. Significantly, the *Miles* Court acknowledged the longstanding principle that "the Jones Acts evinces no general hostility to recovery under maritime law. *It does not disturb the seaman's general maritime claims for injuries resulting from unseaworthiness.*" *Id.* at 289 (emphasis added).

Because the case before it involved a wrongful death claim, however, the Court looked to the statutory provisions of DOHSA and the Jones Act for guidance. With respect to DOHSA, the Court found that Congress had spoken "directly to the question of recoverable damages on the high seas...." *Id.* at 290. In such a case, the *Miles* Court stated that "the courts are not free to 'supplement' Congress' answer so thoroughly that the Act [DOHSA] becomes meaningless." *Id.* (quoting *Higginbotham*, 436 U.S. at 625). With respect to the Jones Act, the *Miles* Court noted that this legislation did not explicitly limit damages to any particular form. Yet, because the Jones Act made applicable certain substantive provisions of the *Federal Employer's Liability Act*, 45 U.S. § 51, *et seq*, to seamen and because the Court had previously held the language of FELA's wrongful death provision to provide recovery only for pecuniary loss, the *Miles* Court deemed, with respect to wrongful death, that the Jones Act afforded damages only for pecuniary losses.[3]

[3] It is interesting, in the case of the Jones Act, that it is only through the Court's own interpretation of FELA's wrongful death provision that only

Because of significant historical and substantive differences between the general maritime injury claim and that of wrongful death, the Court's rationale in *Miles* of looking to federal statutes for guidance is simply inappropriate where, as here, the underlying cause of action is based on injury and not death. There is no doubt that in the common law, no cause of action for wrongful death existed. *Mobil Life Insurance Company v. Brame*, 95 U.S. 754, 756 (1877). *See also*, Malone, *The Genesis of Wrongful Death*, 17 Stan.L.Rev. 1043 (1965). Similarly, recovery for wrongful death was traditionally prohibited under the general maritime law. *The Harrisburg*, 119 U.S. 199 (1886). Accordingly, wrongful death actions were legislatively created, and today, every state has enacted a wrongful death statute. S. Speiser, *Recovery for Wrongful Death*, Section 1.9 (2d.Ed. 1975).

Both DOHSA and the Jones Act were statutory efforts to fill the vacuum left by the absence of a wrongful death remedy at common law. Thus, this Court's decision in *Miles* to analogize the general maritime's wrongful death remedy to the statutory wrongful death remedy as afforded by DOHSA and the Jones Act and thereby preclude loss of society damages is imminently reasonable given the historical context in which the general maritime wrongful death action was created. The same rationale makes no sense, however, in the context of an injury case.

Unlike wrongful death claims, the right of a seaman to sue for *injuries* under the general maritime law is one of the most

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pecuniary losses are recoverable. As the Court points out, the language of FELA's wrongful death provision "is essentially identical to that of Lord Campbell's Act, 9 and 10 vict. ch. 93 (1846), the first wrongful death statute." *Miles, supra* at p. 325. Because Lord Campbell's Act has been interpreted to permit recovery only for pecuniary losses in wrongful death cases and because many of the state statutes that followed it had done the same, the Supreme Court in *Michigan Central Railway Company v. Vreeland*, 227 U.S. 59 (1913), interpreted FELA's wrongful death provision to preclude recovery for loss of society.

time honored remedies accorded these traditional wards of the court, *The OSCEOLA*, 189 U.S. 158 (1903). It is clear that, with respect to the *injury* based general maritime claim, neither the Jones Act nor DOHSA was intended to impair, adversely affect or preclude supplementation of this remedy. As this Court stated in *Miles*: "the Jones Act evinces no general hostility to recovery under maritime law. It does not disturb seamen's general maritime claims for injuries resulting from unseaworthiness." *Miles*, *supra*, 111 S.Ct. at 324.

Similarly, with respect to DOHSA, this Court stated in *Moragne*, *supra*:

> "...No intention appears that the [Death on the High Seas Act] had the affect of foreclosing any non-statutory federal remedies that might be found appropriate to affectuate the policies of general maritime law."
>
> *Moragne*, 398 U.S. 375, 400.

Therefore, with respect to personal injury, as opposed to a wrongful death case, there is no congressional intent to withhold a loss of consortium remedy to the spouse of an injured seaman. As the *Alvez* Court stated, "[a]part from the question of statutory pre-emption, the liability schemes incorporated in DOHSA and the Jones Act should not be accorded overwhelming analogical weight in formulating remedies under the general maritime law. * * * The Jones Act itself was not the product of careful drafting or attentive legislative review; assuming that the statute bars damages for loss of society, it does so solely by virtue of judicial interpretation of the Federal Employer's Liability Act, 45 U.S.C. Sections 51, *et seq*, which was incorporated into the Jones Act...." 446 U.S. at 283. Thus, "a remedial omission in the Jones Act is not evidence of considered congressional policy making that should command our adherence in analogical contexts." *Id*, at 283-284.

One of the issues this Court confronted in the first Jones Act case to come before it, *Panama R.R. Co. v. Johnson*, 264 U.S. 375 (1924), was the nature of the relationship between the Jones Act and the general maritime law. The employer in that case contended that the Jones Act was unconstitutional because it encroached on the constitutionally granted admiralty jurisdiction of the federal courts and withdrew from them longstanding maritime rights and remedies. *Id.* In *Panama*, *supra*, the Court described the relationship between the Jones Act and the general maritime law:

> "Rightly understood, the statute [the Jones Act] neither withdraws injuries to seamen from the reach and operation of the maritime law, nor enables the seamen to do so. On the contrary, it brings into the law new rules drawn from another system and extends to the injured seaman a right to invoke, *at their election*, either the relief accorded by the old rules or that provided by the new rules. *The election is between alternatives accorded by the maritime* law as modified, and not between that law in some non-maritime system."
>
> *Id*, at 388-389 (emphasis added).

In short, the Jones Act and the general maritime law provide alternative remedies for seamen in personal injury cases. A seaman may recover either the statute or the general maritime law. The general maritime law includes the right to seek loss of consortium damages suffered by the spouse of an injured seaman. Thus, this supplement to the Jones Act, in the context of an injury case, does not conflict with it.

Furthermore, in matters involving claims under the Jones Act, the Supreme Court has not deferred to FELA's provisions at the expense of the general maritime law. This principle is well-illustrated in both *The Arizona v. Anelich*, 298 U.S. 110 (1936), and *Beadle v. Spencer*, 298 U.S. 124 (1936). In these cases, which were brought under the Jones Act, the defendants

contended that the defense of assumption of the risk was available because, at that time, assumption of the risk was an available defense under FELA when violation of a safety statute did not exist. The general maritime law, of course, had never recognized assumption of the risk as a defense in maritime cases. In denying defendants' contentions, the Court stated that:

> "The Jones Act thus brings into the maritime law new rules of liability. The source from which these rules are drawn defines them but prescribes nothing as to their operation in the field to which they are transferred. 'In that field their strength and operation come altogether from their inclusion in the maritime law' by virtue of the Jones Act. The election for which it provides 'is between the alternative accorded by the maritime law as modified and not between the law and some non-maritime system'."

The *Arizona v. Anelich*, 298 U.S. 110, 119 (1936) [citing *Panama Railroad Co. v. Johnson*, 264 U.S. 375, 388 (1923)]. Thus, when a substantive provision of FELA conflicts with maritime principles in a Jones Act case, a court does not err in giving weight to the general maritime law and in following "the humanitarian policy of the maritime law." *See, e.g., Higginbotham*, 436 U.S. at 622 (quoting *Gaudet*, 414 U.S. at 587-588).

When one does examine the remedy accorded by the Jones Act in an injury case, however, it is interesting to note that while the statute is itself silent on the kind of damages permitted, the Act has been interpreted to allow recovery of non-pecuniary damages such as physical pain, suffering, mental anguish, discomfort and inconvenience. *Downie v. United States Lines Co.*, 359 F.2d 344 (3rd Cir. 1966), *cert. den.*, 385 U.S. 897; Norris, *The Law of Seamen*, 4th Edition, Section 30:41, pp. 518-520. Clearly it could not be seriously argued (and in fact was not argued in this case) that such damages as these are precluded under *Miles* by analogy to the wrongful death statutes

of the Jones Act and DOHSA. Rather, these non-pecuniary damage awards given to the maritime worker are entirely consistent with this Court's granting of similar non-pecuniary damages for loss of consortium to the seaman's spouse. To the extent that the Jones Act is silent on the issue of damages to be afforded to the injured seaman, however, jurisprudential supplementation of that remedy is appropriate. As this Court stated in *Miles*, "in an area left open by statute, supplementation was entirely appropriate." *Miles*, at p. 290.

In the present case, however, the Court below reasoned that by limiting the case of *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, this Court in *Miles* "...removed the judicial underpinnings of *Alvez* and *Cruz*..." and "at least implicitly placed the same restriction on *Alvez*..." that it had placed on *Gaudet*. *Murray v. Anthony J. Bertucci Construction Company, Inc.*, *supra*, at p. 130. This is simply not so.

This Court in *Miles* had every opportunity to limit *Alvez* as it did with *Gaudet*. It chose not to do so. As stated by one of the first courts to consider this issue:

> "This Court finds *Miles'* discussion of *Sea-Land Services, Inc. v. Gaudet* [citation omitted] particularly revealing on this point. *Gaudet* permitted loss of society damages for the *death* of a longshore worker killed in territorial waters. *Miles* carefully confined the holding of *Gaudet* to cases involving longshore workers and taking place in territorial waters. But in citing *Alvez*, a *non-fatal* injury case, *Miles* did not see fit to spell out any such limitations, indicating that *Alvez* is still 'good law'."
>
> *Rayborn v. Zapata Off-Shore Company*, No. 90-0467, (W.D. La., May 2, 1991), at p. 5, fn. 1. (Emphasis the Court's).

The Court below also based its decision on its conclusion that because *Miles* had espoused a strong deference to Congress and federal maritime legislation, that it was "...required, there-

fore, to look to the Jones Act to consider the scope of the damage award for a seaman's injury." The Fifth Circuit reasoned that because there was no general maritime loss of consortium award in injury cases in existence at the time the Jones Act was passed, the Court in *Miles* must necessarily have intended to exclude loss of consortium in injury cases, like death cases. As argued more fully hereinabove, this conclusion ignores the fundamental difference in the history of wrongful death as opposed to general maritime injury and further, ignores the Jones Act's long recognition of other non-pecuniary damages available to it in the context of an injury case. *See e.g., Downie v. United States Lines Co., supra*; Norris, *The Law of Seamen, supra*.

Furthermore, the reasoning of the Court in *Murray* presumes, erroneously, that the general maritime law is a fixed entity and, unlike its shoreside counterpart, the common law, is to remain static and fixed in time. By this same logic, because Congress has never passed maritime products liability legislation, or included such a right of action in the Jones Act, or because products liability was not a well developed legal doctrine in 1920, a general maritime law cause of action based upon injury or death caused by a defective product should not exist.

In fact, however, such reasoning as that has not been followed. This Court in *East River Steamship Corp. v. Transamerican Delaval, Inc.*, 476 U.S. 858 (1986) considered the question of whether products liability law could be engrafted into the general maritime law. In holding that it could, the Court said, at p. 864:

> "Absent a relevant statute, the general maritime law, as developed by the judiciary, applies... Drawn from state and federal sources, the general maritime law is an amalgam of traditional common law rules, modifications of those rules and newly created rules.

See *Kermarec v. Compagnie Generale Transatlantque*, 358 U.S. 625, at 630 (1959)."

Indeed it has been held that state law may appropriately be applied to suppliment federal maritime law where the state rule does not directly conflict with an established general maritime rule and the state's interest in the matter is great. *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, 348 U.S. 310 (1955). As is argued more fully in connection with the childrens' claim, application of this principle is most appropriate in the present case where both the plaintiffs and the defendants are Louisiana citizens, the accident occured in Louisiana territorial waters[4] and Louisiana's statutory recognition of the consortium claim (Louisiana Civil Code Article 2315.5) is consistent with the Court's pronouncement in *Alvez, supra*,. At the very least, it does not conflict with any established maritime rule.

In conclusion, because of the fundamental historical and substantive differences between the general maritime injury case and that seeking wrongful death damages, neither the approach taken nor the result reached in *Miles* obtains in the present case. *Alvez* is indeed still "good law" and, accordingly, this Honorable Court should grant certiorari to correct the grave error of the Court of Appeals below.

B. The Court of Appeal erred in denying David Murray's Minor Children Damages for Their Loss of Love, Companionship, Society and Services of Their Father.

While it is true that only one case has, to date, recognized a child's right to recover loss of society damages in a general maritime injury case [*Kelly v. T. L. James Co., Inc.*, 603 F.Supp.

[4] The Louisiana Supreme Court recently recognized such factors as demonstrating Louisiana's "strong interest in applying to our law" in a maritime case. *Green v. Industrial Helicopters, Inc.*, 593 So.2d 634 (La. 1992) at p. 638. *In Green, supra,* the Court applied Louisiana Civil Code Article 2317 to a general maritime case.

390 (W.D. La. 1985)], it is respectfully submitted that the analysis and result reached in this case is a correct statement of the general maritime law which should recognize such a remedy first, because such a right is consistent with the already existing and recognized remedy of the spouse of an injured maritime worker to recover such damages under the general maritime law. *American Export Lines, Inc. v. Alvez, supra*; secondly, there is no established and inflexible rule withholding the remedy and the recognition of this remedy is consistent with the "special solicitude" granted in our maritime law both to the seaman as well as their dependents, *Alvez, supra*, 100 S.Ct. at pp. 1679-1680; thirdly, such recognition would be consistent with the growing number of states which have acknowledged such a right; and finally, such recognition is most appropriate under the peculiar facts of this case: where Louisiana plaintiffs were injured by Louisiana defendants within Louisiana territorial waters and Louisiana statutory recognition of the child's right to sue for loss of society damages (Louisiana Civil Code Article 2315) may properly supplement the general maritime law.

The common law has long recognized the right of a husband to recover damages for the loss of consortium he has suffered because of physical injuries to his wife. *Prosser & Keeton on Torts*, 5th Ed., Sec. 125, p. 931. By the time this Court decided *American Export Lines, Inc. v. Alvez, supra*, the vast majority of common law courts had recognized a similar right in favor of the wife who suffered her own damages as a result of physical injury to her husband. *Alvez, supra*, at p. 1679. *Alvez* specifically held that general maritime law permits the spouse's recovery of loss of consortium and society damages.

While such a remedy has not traditionally been recognized in favor of the children of a physically injured plaintiff, a growing number of states since 1980 have recognized this rule: *Arizona - Villareal v. State Department of Transportation*, 160 Ariz. 474, 774 P.2d 213 (1989); *Alaska - Hibpshman v. Prud-*

hoe Base Supply, Inc., 734 P.2d 991 (Alaska 1987); *Iowa* - I.C.A. Section 613.15, as interpreted in *Audubon-Exira Ready-Mix, Inc. v. Illinois Central Gulf Railroad Company*, 335 N.W.2d 148 (Iowa 1983); *Louisiana* - Louisiana Civil Code Articles 2315 and 2315.5; *Massachusetts - Ferriter v. Daniel O'Connell's Sons, Inc.*, 381 Mass. 507, 413 N.E.2d 690 (1980); *Michigan - Berger v. Weber*, 411 Mich. 1, 303 N.W.2d 424 (1981); *Vermont - Hay v. Medical Center Hospital of Vermont*, 145 Vt. 533, 496 A.2d 939 (1985); *Washington - Ueland v. Reynolds Metals Company*, 103 Wash.2d 131, 691 P.2d 190 (1984); *Wisconsin - Theama By Bichler v. Kenosha*, 117 Wis.2d 508, 344 N.W.2d 513 (1984). *See also, Prosser & Keeton on Torts*, Sec. 125, pp. 935-936.

This trend in favor of the recognition of such a remedy is based on sound legal reasoning. Nearly all commentators who have addressed this subject agree that such a remedy should be recognized.[5]

> "The reasons for allowing the child recovery when his parent is wrongfully injured would appear to outweigh the defendants' claim to immunity. Foremost among these reasons must be the recognition that the child suffers a serious loss when he is deprived of a parent's love, care, companionship and guidance. The loss of these benefits can have a

5 See, e.g., Dwork, "The Child's Right to Sue for Loss of a Parent's Love, Care and Companionship Caused By Tortious Injury to the Parent," 56 B.U. L.Rev. 722 (1976); Radensky, "The Child's Claim for Loss of Parental Consortium-The Prospects for the Nineties (The Decade of a Kinder, Gentler Society?)," 17 West. St. Univ. L.Rev. 277 (1990); Gerse, "Compensating the Child's Loss of Parental Love, Care and Affection," Vol. 1983 Univ. of Ill. L.Rev. 293; Note, "Child's Right to Sue for Negligent Disruption of Parental Consortium," 22 Wash.L.J. 80 (1982); Comment, "The Child's Claim for Loss of Consortium Damages: A Logical and Sympathetic Appeal," 13 San Diego L.Rev. 231 (1975); Johnson, "Compensating Parents for the Loss of their Nonfatally Injured Child's Society: Extending the Notion of Consortium to the Filial Relationship," Vol. 1989 Univ. of Ill. L.Rev. 761.

> severe impact on the child's development and thus have a major influence on the child's welfare and his personality throughout his life. Because every individual's character and disposition have an impact on society, 'it is of the highest importance to the child and society that its right to receive the benefits derived from its [parents] be protected.'"
>
> Dwork, "The Child's Right to Sue for Loss of a Parent's Love, Care and Companionship Caused By Tortious Injury to the Parent," 56 B.U. L.Rev. 722 (1976), at pp. 740, 741, quoting *Miller v. Monsen*, 228 Minn. 400, 403, 37 N.W.2d 543, 545 (1949).

The arguments traditionally arrayed against the right of children to recover for loss of consortium simply do not stand up under critical scrutiny. For instance, it has sometimes been said that the child's loss of consortium is "inherently speculative," but no logical distinction can be drawn between this item of damage and any other non-pecuniary item of damage clearly recoverable under our law, such as physical pain and suffering or mental anguish and distress. Our law recognizes that, while these items may not be as easily documented as "out of pocket" expenses, they are nonetheless as real and sometimes are more devastating than the pecuniary loss. A child's loss of society, like a pain and suffering award, should be recoverable if proved to the satisfaction of the jury or other fact-finder. In this case, such proof was graphic and emphatically supports the finding of the jury that a significant loss was suffered by these children.

Another argument sometimes made is that because the child cannot sue to enforce a claim for parental services, he is not entitled to recover the loss of such services caused by the tortious injury to a parent. As pointed out in the detailed analysis of this subject in the Boston University Law Review:

> "This argument injects a false issue into the analysis. One need not be legally entitled to a benefit in order to recover for its loss; the law has recognized that an

> individual with only a reasonable expectancy of receiving benefits is entitled to have its interest in those benefits protected from unreasonable interference."
>
> Dwork, *Id* at p. 730, fn. 1; *see also*, Radensky, "The Child's Claim for Loss of Parental Consortium - The Prospects for the Nineties (The Decade of a Kinder, Gentler Society?)," 17 West. St. Univ. L.Rev. 277 (1990).

The argument that such a recovery might "overlap the parent's recovery" is equally invalid since, in the instant case, both by way of proof and instructions to the jury, the jury was properly instructed as to the separate items of damage for each plaintiff. See Dwork, *Id* at p. 733. This article goes on to say:

> "The courts themselves have recognized the 'natural justice' of the child's claim, which rests on the simple propositions that a grievous loss has been sustained and that the courts are equipped to afford the only practical remedy. The law is elevated when it extends its protection to interests recognized by modern society as important, particularly when the obstacles to legal recognition of these interests are not formidable."
>
> Dwork, *Id* at p. 744.

In sum, there is simply no valid basis for denying such a claim under the general maritime law.

Our Supreme Court has correctly characterized general maritime law as "judge formulated law." *American Export Lines, Inc. v. Alvez, supra*, 100 S.Ct. at p. 1677. In the performance of this task, our Supreme Court has reminded courts sitting in admiralty that their decisions should reflect not only "...a special solicitude for the welfare of those men who under[take] to venture upon hazardous and unpredictable sea voyages..." but also "...to the dependents of [seafarers]...."

American Export Lines, Inc. v. Alvez, supra, 100 S.Ct. at pp. 1679-1680. This "special solicitude" has evolved into the "...settled canon of maritime jurisprudence that 'it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules.'" *American Export Lines, Inc. v. Alvez, supra*, at p. 1677, quoting *The Sea Gull*, 21 F.CS. 909, 910 (No. 12,578, C.C.D. Md. 1865); *see also, Kelly, supra*, at p. 393.

In the present case, there is no "established and inflexible rule" denying these children the very real damages they have suffered. On the contrary, such a remedy is consistent with both the already recognized right to recover such damages in favor of the spouse in a general maritime case (see *Alvez, supra* and *Cruz, supra*) and with the recent trend at common law recognizing this right (see cases and articles cited hereinabove).

There is, however, an additional reason why the recognition of the children's right to loss of consortium damages is particularly appropriate in this case: Louisiana law statutorily recognizes a child's right to sue for loss of society/consortium damages suffered as a result of physical injury to the parent. La.C.C. Art. 2315, 2315.5. Federal courts at all levels, sitting in admiralty, have all permitted the enforcement of state law. See e.g. *Wilburn Boat Co. v. Fireman's Insurance Co., supra*. Since maritime law is not, in and of itself, a complete and independent body of law, it is subject to supplementation by local law. Justice Frankfurter in *Romero v. International Terminal Operating Company*, 358 U.S. 354, 373 (1959) wrote:

> "...to claim that all enforced rights pertaining to matters maritime are rooted in federal law is a destructive oversimplification of the highly intricate interplay of the States and National Government in their regulation of maritime commerce."

State laws may be applied as an additional maritime tort remedy. *Powell v. Offshore Navigation, Inc.*, 644 F.2d 1063 at

1065, fn. 5, (5th Cir. 1982); *Green v. Industrial Helicopters, Inc., supra*. The Supreme Court in *Just v. Chambers*, 312 U.S. 383 (1941) explained:

> "...it is not a principle of our maritime law that a court of admiralty must invariably refuse to recognize and enforce a liabiiity which the State has established in dealing with a maritime subject."
>
> *Just v. Chambers, supra*, at 312 U.S. 387-388.

In *Kossick v. United Fruit Company*, 365 U.S. 731 (1961), the Court noted that "...it blinks at reality to assert that because a longshoreman, living ashore and employed ashore by shoreside employers, performs seaman's work, the State with these contacts must lose all concern for the longshoreman's status and well-being." *Kossick, supra*, at 365 U.S. 739. Where there are strong state interests to be protected in a dispute, and where the application of state law would not do *direct* violence to the general principles of maritime law, its application as a supplement to the relief granted under maritime law is proper. *Baggett v. Richardson*, 473 F.2d 863 (5th Cir. 1973), provides another example of an Admiralty Court that applied Louisiana law.

In this case, plaintiffs are Louisiana citizens; the defendant Anthony J. Bertucci Construction Company is a Louisiana corporation and the accident occurred within Louisiana territorial waters. It is undeniable, therefore, that Louisiana has a significant interest in the outcome of this action. *Green v. Industrial Helicopters, Inc. supra.*

In *Skiriotes v. Florida*, 313 U.S. 69 (1941), Chief Justice Hughes affirmed Florida's Supreme Court in its application of local law to one of its citizens working on (and under) the high seas.

> "If the United States may control the conduct of its citizens upon the high seas, we see no reason why the State of Florida may not likewise govern the conduct

> of its citizens upon the high seas with respect to matters in which the State has a legitimate interest and where there is no conflict with acts of Congress. Save for the powers committed by the Constitution to the Union, the State of Florida has retained the status of a sovereign. Florida was admitted to the Union 'on equal footing with the original States, in all respects whatsoever'. And the power given to Congress by Section 3 of Article IV of the Constitution to admit new States relates only to such States as are equal to each other 'in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself'. [Citation omitted.]"
>
> *Skiriotes v. Florida, supra*, 313 U.S. 77.

Since this action involves citizens of Louisiana and the accident occurred in Louisiana waters, its laws are applicable here unless preempted by valid federal law. Our federal system recognizes the states' concurrent jurisdiction in matters primarily subject to federal regulation. The Supreme Court has held that "the state, having concurrent jurisdiction, is free to adopt such remedies and to attach to them such incidents, as it sees fit." *Red Cross Line v. Atlantic Fruit Company*, 264 U.S. 109, 124 (1924).

Thus, there is ample precedent for the application of Louisiana's loss of consortium provisions to supplement maritime law. Since there is no compelling reason to prevent it, under the facts and circumstances of this case, this Honorable Court should permit the citizens of Louisiana the benefit of the laws which have been enacted to protect them.

CONCLUSION

The right of a spouse to recover damages for the loss of consortium she suffers as a result of personal injuries incurred by her husband comports with established principles guiding

the general maritime law. Such a right of recovery is deeply rooted in the common law and, as such, has been properly incorporated into the evolution of the general maritime law. While the Jones Act and the Death on the High Seas Act embody statutory determinations that non-pecuniary damages should not be recoverable in maritime wrongful death cases, no such legislative determination exists with respect to general maritime personal injury cases.

Plaintiffs-applicants urge this Honorable Court to grant certiorari in this case, reverse the holding of the Court below and affirm the trial court's judgment in favor of Mrs. Murray on her claim for the loss of her husband's consortium and, with respect to the children's claim, recognize the jury's award in their favor, for to do so is not only consistent with this Court's prior ruling in *Alvez* but to do so would also comport with a longstanding principle of maritime law — that "it better becomes the humane and liberal character of proceedings and admiralty to give than to withhold the remedy." *The Sea Gull*, 21 F.CS. 909, 910 [C.C.D. MD. 1865 (No. 12,578].

Respectfully submitted,

deGravelles, Palmintier & Holthaus

By:_____

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

United States District Court

Eastern District of Louisiana

DAVID W. MURRAY AND SALLY MURRAY

VERSUS

ANTHONY J. BERTUCCI CONSTRUCTION CO., INC., M/V BARBARA ANN, et al

Civil Action Number: 88-088
Section: I(2)

Filed U.S. District Court
Eastern District of Louisiana
November 5, 1990

JUDGMENT

This matter came on for trial on September 4, 5, 6, 7, 10 & 11, 1990.

Present: John W. deGravelles and Michael C. Palmintier, attorneys for plaintiffs, David Murray, individually and as administrator of the estate of his minor children, Desarea Murray, David W. Murray, Jr. and Darryl Murray; and Sally Murray;

Alexander N. Breckinridge, IV, and Elizabeth Rue, attorneys for defendants, Anthony J. Bertucci Construction Co., Inc. and Pacific Employers Insurance Co.;

Not Present: Hugh Lambert, attorney for intervenor, Lambert and Nelson, PLC;

Robert M. Johnston, attorney for intervenors, Robert M. Johnston and Ungar & Wheelahan.

Considering the findings of the jury as to the liability of defendants, Anthony J. Bertucci Construction Co., Inc. and Pacific Employers Insurance Company and the damages sustained by David Murray and Sally Murray; considering the Court's ruling on the issues of limitation of liability and the claims for loss of consortium of David Murray as administrator of the estate of his minor children, Desarea Murray, David W. Murray, Jr. and Darryl Murray; and considering the stipulation entered into by and between plaintiffs and intervenors.

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiff David W. Murray and against defendants, Anthony J. Bertucci Construction Co., Inc. and Pacific Employers Insurance Company, *in solido*, in the principle sum of SIX HUNDRED SIXTY-TWO THOUSAND EIGHT HUNDRED AND NO/100 ($662,800.00) DOLLARS;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiff Sally Murray and against defendants, Anthony J. Bertucci Construction Co., Inc. and Pacific Employers Insurance Company, *in solido*, in the principle sum of ONE HUNDRED SEVENTY-FIVE THOUSAND AND NO/100 ($175,000.00) DOLLARS.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of defendants, Anthony J. Bertucci Construction Co., Inc. and Pacific Employers Insurance Company and against plaintiff David W. Murray, as administrator of the estate of his minor children, Desarea Murray, David W. Murray, Jr. and Darryl Murray, denying his claim for the loss of consortium suffered by Desarea Murray, David W. Murray, Jr. and Darryl Murray.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiffs, David W. Murray and Sally Murray, and against defendants, Anthony J. Bertucci Construction Co., Inc. and Pacific Employers Insurance Company, denying the claim of Anthony J. Bertucci Construction Co., Inc. and Pacific Employers Insurance Company for exoneration from and/or limitation of liability.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment on the petitions of intervention as follows: that the attorneys' fee of 35% of amounts recovered on behalf of the plaintiffs be and is hereby apportioned as follows:

In the event that the judgment is paid or the case is settled prior to appeal, then in that event John W. deGravelles will be paid 50% of the aforementioned attorneys' fee, Lambert & Nelson, PLC will receive 25% of the above mentioned attorney's fee; and Robert M. Johnston and Ungar & Wheelahan will receive 25% of the attorney's fees. In addition thereto, attorneys John W. deGravelles, Lambert & Nelson, PLC, Robert M. Johnston and Ungar and Ungar & Wheelahan will receive reimbursement of all costs expended in connection with prosecution of the case.

In the event that the Judgment is paid or the case is settled after appellate briefs have been filed on behalf of plaintiff and oral argument has been made, then in that event, John W. deGravelles will be paid 60% of the aforementioned attorneys' fee, Lambert & Nelson, PLC will receive 20% of the above mentioned attorney's fee and Robert M. Johnston and Ungar & Wheelahan will receive 20% of the attorney's fees. In addition thereto, attorneys John W. deGravelles, Lambert & Nelson, PLC, Robert M. Johnston and Ungar & Wheelahan will receive reimbursement of all costs expended in connection with prosecution of the case.

Interest will be awarded on all sums awarded herein from date of judgment in accordance with 28 U.S.C. Section 1961.

THUS DONE AND SIGNED in New Orleans, Louisiana this 5th day of November, 1990.

/s/_____
Judge, United States District Court
Eastern District of Louisiana

Entered November 7, 1990
Approved As To Form:

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United States District Court

Eastern District Of Louisiana

DAVID W. MURRAY and SALLY MURRAY

VERSUS

ANTHONY J. BERTUCCI CONSTRUCTION CO., ET AL.

Civil Action No. 88-88
Section "I" (2)

Filed U.S. District Court
Eastern District of Louisiana
December 11, 1990

ORDER AND REASONS

The court has before it two motions: a motion for alteration or amendment of judgment or alternatively for partial new trial on the issue of award for children's loss of consortium filed by the plaintiffs (the Murrrays); and a motion for new trial or alternatively for remittitur of damages filed by the defendant (Bertucci).

I. CHILDREN'S LOSS OF CONSORTIUM CLAIM

The plaintiff has urged the court to reconsider its earlier ruling denying the Murray children a claim for loss of consortium. After such reconsideration, the court adheres to its original ruling denying the claim for the reasons given in its memorandum opinion on the issue.

II. MOTION FOR NEW TRIAL OR REMITTITUR OF DAMAGES

At the conclusion of a five-day trial, the jury returned a verdict for David Murray in the amount of $668,000 and for Sally Murray in the amount of $175,000. Bertucci argues that the general damages award of $375,000 awarded to David Murray and the $175,000 loss of consortium award to Sally Murray are excessive. It urges the court either to grant a new trial or to grant a remittitur.

A review of the facts of the case shows that David Murray fell on some rocks that had accumulated on the deck of the barge on which he was working. He was treated by Dr. Raeburn Llewellyn who performed a decompression laminectomy at L4-5 accompanied by the excision of a spondylolesthetic defect at L5-S1 and a fusion performed by Dr. Kenneth Veca. The fusion has healed solid and further surgery is not recommended. Despite the apparent success of the surgery, David Murray suffers from chronic pain. The plaintiff's physicians attribute the pain to formation of scar tissue. He is unable to dress himself without assistance; he is unable to walk or stand for any length of time without the use of a cane; he must wear a back brace or TENS unit; he is unemployable; he cannot drive a car or perform any household chores. Furthermore, he is unable to have normal sexual relations with his wife and must rely on her assistance to have a bowel movement. The constant pain and inability to care for himself have caused David Murray to become severely depressed and occasionally even suicidal.

The defendant introduced expert testimony that indicated physical therapy might provide some relief to David Murray. However, plaintiff's experts indicated that David Murray would not make any significant improvement if he entered a course of physical therapy. In their opinion, David Murray would experience pain for the rest of his life and would require the assistance of another person to perform his daily activities.

The result of this case indicates to the court that the jury found the plaintiff's expert more persuasive. Although David Murray had only one back surgery, he still suffers from unremitting and debilitating back pain. The court finds this case to be similar to *Andrews v. Mosley Well Service*, 514 So. 2d 491 (La. Ct. App. 3d Cir. 1987). The plaintiff, Andrews, suffered an injury to his back that required a decompression surgery. Six months after the surgery, the time of maximum cure, Andrews was still suffering pain and disability. Andrews's doctors testified that he could never return to manual labor, he could not stoop, bend, lift, pull, or climb, nor could he sit or stand for long periods of time. His condition was permanent. Andrews received $400,000 in general damages.

In light of the *Andrews* decision, the court finds that the $375,000 award for general damages given to David Murray is not "entirely disproportionate to the injury sustained." *Simeon v. T. Smith & Son, Inc.*, 852 F.2d 1421, 1426 (5th Cir. 1988) (quoting *Caldarera v. Eastern Airlines*, 705 F.2d 778 (5th Cir. 1988)).

The court likewise finds that the award to Sally Murray is not so disproportionate as to require a new trial or a remittitur. After David Murray's accident, the relationship between the Murray's changed from that of husband-wife to that of mother-child. Mr. Murray became incapable of aiding his wife around the house; of working and supporting his wife; of engaging in sexual relations with his wife; and of caring for himself on a daily basis. Mr. Murray also suffers from severe depression, which makes the

To argue, as does the defendant, that $25,000 will compensate Sally Murray for her losses is ludicrous. According to the plaintiff's doctors, David Murray has become almost physically useless and greatly impaired mentally due to his depression; Sally Murray is no longer living with the same man she married. His condition is likely to be permanent.

Accordingly,

IT IS ORDERED that the plaintiffs' motion for alteration of judgment or alternatively for partial new trial on the issue of award for children's loss of consortium is DENIED.

IT IS FURTHER ORDERED that the defendant's motion for new trial or alternatively for remittitur of damages is DENIED and the hearing scheduled on the motions for DECEMBER 5, 1990 is CANCELED.

New Orleans, Louisiana this 11th day of December, 1990.

/s/_____
Henry A. Mentz
United States District Judge

Date of Entry: December 13, 1990

United States District Court

Eastern District of Louisiana

Minute Entry
December 14, 1990
Mentz, J.

DAVID W. MURRAY and SALLY MURRAY

VERSUS

ANTHONY J. BERTUCCI CONSTRUCTION CO., ET AL.

Civil Action No. 88-88
Section "I" (2)

Filed U.S. District Court
Eastern District of Louisiana
December 17, 1990

It has been brought to the court's attention that a line was inadvertently left out of this court's order and reasons dated December 11, 1990.

Accordingly,

IT IS ORDERED that the order and reasons dated December 11, 1990 be AMENDED and the following phrase be inserted at the bottom of page three: "relationship between the Murrays that much more difficult."

Clerk to serve all counsel.

Date of Entry: December 17, 1990

United States District Court

Eastern District of Louisiana

DAVID W. MURRAY AND
SALLY MURRAY

VERSUS

ANTHONY J. BERTUCCI CONSTRUCTION CO., INC.,
M/V BARBARA ANN, ET AL.

Civil Action No. 88-88
Section "I" (2)

We, the Jury, in the above-captioned action, unanimously find as follows:

1. Do you find from a preponderance of the evidence that plaintiff was involved in an accident as alleged on October 7, 1987? Answer "Yes" or "No."

Answer Yes

If you have answered Question No. 1 "Yes," proceed to Question No. 2. If you have answered Question No. 1 "No," proceed no further. Instead, sign and date the verdict form and inform the Marshal that you have reached a verdict.

2. Do you find from a preponderance of the evidence that the Defendant was negligent under the Jones Act? Answer "Yes" or "No."

Answer Yes

If you have answered Question No. 2 "Yes," proceed to Question No. 3. If you have answered Question No. 2 "No," do not answer Question No. 3. Proceed, instead, to Question No. 4.

3. Do you find from a preponderance of the evidence that the Defendant's negligence under the Jones Act was a legal cause of the Plaintiff's injuries? Answer "Yes" or "No."

Answer Yes

Proceed to Question No. 4.

4. Do you find from a preponderance of the evidence that the Crane Barge AB-11 was unseaworthy at the time of Plaintiff's injury? Answer "Yes" or "No."

Answer Yes

If you have answered Question No. 4 "Yes," proceed to Question No. 5. If you have answered Question No. 4 "No," DO NOT answer Question No. 5. Proceed, instead, to Question No. 6 only if you have answered "Yes" to Question No. 3. If not, sign and date the verdict form and inform the Marshal that you have reached a verdict.

5. Do you find from a preponderance of the evidence that the Crane Barge AB-11's unseaworthiness was a legal cause of the Plaintiff's injury? Answer "Yes" or "No."

Answer Yes

Answer Question No. 6 only if you have answered "Yes" to either Question No. 3 OR Question No. 5. If you have answered "No" to either Question No. 2 OR Question No. 3 AND Question No. 5, sign and date the verdict form and inform the Marshal that you have reached a verdict.

6. Do you find from a preponderance of the evidence that the Plaintiff was contributorily negligent? Answer "Yes" or "No."

Answer No

IF you have answered Question No. 6 "Yes," proceed to Question No. 7. If you have answered Question No. 6 "No," skip Question No. 7 and Question No. 8. Proceed instead to Question No. 9.

7. Do you find from a preponderance of the evidence that the Plaintiff's contributory negligence was a legal cause of his injuries? Answer "Yes" or "No."

Answer

If you have answered Question No. 7 "Yes," proceed to Question No. 8. If you have answered Question No. 7 "No," DO NOT answer Question No. 8. Proceed, instead, to Question No. 9.

8. To what extent did the Plaintiff's contributory negligence cause his injuries? Answer in terms of a percentage (1% to 99%).

Answer %

Proceed to Question No. 9.

9. What amount, by a preponderance of the evidence, do you find will adequately compensate the Plaintiff for the injuries he received aboard the Crane Barge AB-11? This award should include all damages to which Plaintiff is entitled based upon his Jones Act and/or unseaworthiness claims. DO NOT make any reduction in the amount if you have found that the Plaintiff was negligent. If any reduction is appropriate, the Court will make it. Answer by means of a numerical figure.

(a) Past loss of wages, if any $35,000.00

(b) Future loss of wages and meals, if any $190,000.00

(c) Future medical expenses, if any $62,800.00

(d) Past pain and suffering, disability, mental anguish, and loss of capacity for the enjoyment of life, if any $100,000.00

(e) Future pain and suffering, disability, mental anguish, and loss of capacity for the enjoyment of life, if any..... $275,000.00

Proceed to Question No. 10 ONLY if you answered "Yes" to Question No. 5. If you answered "No" to Question No. 5, proceed no further. Sign and date the verdict form, and inform the Marshal that you have reached a verdict.

10. Do you find from a preponderance of the evidence that Plaintiff Sally Murray has suffered loss of her husband's services, comfort, society, and attentions in the past and in the future by reason of his injury? Answer "Yes" or "No."

Answer Yes

If you answered Question No. 10 "Yes," proceed to Question No. 11. If you answered "No" to Question No. 10, proceed to Question No. 12.

11. What amount, by a preponderance of the evidence, do you find will adequately compensate Plaintiff Sally Murray for the loss of her husband's services, comfort, society, and attentions in the past and in the future by reason of his injury? Answer by means of a numerical figure.

Answer $175,000.00

Proceed to Question No. 12.

12. Do you find from a preponderance of the evidence that Plaintiff, Desarea Murray, has suffered loss of her father's services, comfort, society, and attentions in the past and in the future by reason of his injury? Answer "Yes" or "No."

Answer Yes

If you answered Question No. 12 "Yes," proceed to Question No. 13. If you answered "No" to Question No. 12, proceed to Question No. 14.

13. What amount, by a preponderance of the evidence, do you find will adequately compensate Desarea Murray for the loss of her father's services, comfort, society, and attentions

in the past and in the future by reason of his injury? Answer by means of a numerical figure.

Answer $37,500.00

Proceed to Question No. 14.

14. Do you find from a preponderance of the evidence that Plaintiff, David W. Murray, Jr., has suffered loss of his father's services, comfort, society, and attentions in the past and in the future by reason of his injury? Answer "Yes" or "No."

Answer Yes

If you answered Question No. 14 "Yes," proceed to Question No. 15. If you answered "No" to Question No. 14, proceed to Question No. 16.

15. What amount, by a preponderance of the evidence, do you find will adequately compensate Plaintiff, David W. Murray, Jr., for the loss of his father's services, comfort, society, and attentions in the past and in the future by reason of his injury? Answer by means of a numerical figure.

Answer $37,500.00

Proceed to Question No. 16.

16. Do you find from a preponderance of the evidence that Plaintiff, Darryl Murray, has suffered loss of his father's services, comfort, society, and attentions in the past and in the future by reason of his injury? Answer "Yes" or "No."

Answer Yes

If you answered "Yes" to Question No. 16, proceed to Question No. 17. If you answered "No" to Question No. 16, sign and date the verdict form and inform the Marshal that you have reached a verdict.

17. What amount, by a preponderance of the evidence, do you find will adequately compensate Plaintiff, Darryl Murray, for the loss of his father's services, comfort, society , and

attentions in the past and in the future by reason of his injury. Answer by means of a numerical figure.

Answer $37,500.00

Please sign and date the verdict form and inform the Marshal that you have reached a verdict.

New Orleans, Louisiana, this 11th day of September, 1990.

/s/_____
Foreperson

United States District Court

Eastern District Of Louisiana

DAVID W. MURRAY AND SALLY MURRAY

VERSUS

ANTHONY J. BERTUCCI CONSTRUCTION CO., ET AL.

Civil Action No. 88-88
Section "I" (2)

Mentz, J.

MEMORANDUM OPINION

Filed September U.S. District Court
Eastern District of Louisiana
September 18, 1990

FACTS

The plaintiff, David W. Murray (Murray), was working as a deckhand for the Bertucci Construction Company (Bertucci) aboard the M/V BARBARA ANN. On October 7, 1987, Murray was injured when moving a cable from an empty rock barge to the crane barge AB-11. Rocks had accumulated on the deck of the AB-11 that the plaintiff attempted to climb over to secure the cable. He slipped on the rocks, sustaining a severe injury to his lower back. In addition to a claim by the plaintiff for damages, the plaintiff's wife and children filed claims for loss of consortium. The defendants have moved the court to strike the Murray children's loss of consortium claim from the case.

ANALYSIS

The Fifth Circuit addressed the issue of a loss of society claim filed by an injured seaman's children in *Madore v. Ingram Tank Ships Inc.*, 732 F.2d 475 (5th Cir. 1984). In *Madore*, the plaintiff was totally disabled as a result of his employer's fault. The district court awarded damages to the plaintiff, loss of consortium to his wife and loss of society to his minor son. *Id.* at 477. On appeal to the Fifth Circuit, the award to the son was reversed. The court stated that "[n]either the Jones Act in terms nor any case cited to us permits recovery by a child for loss of the society of a living parent." *Id.* at 479. Furthermore, the "overwhelming majority" of courts that considered a loss of society claim for seamen's children had rejected it. *Id.*

Although the argument can be made that *Madore* applies only to Jones Act recovery, *see, e.g.*, *Kelly v. T.L. James Co., Inc.*, 603 F.Supp. 390 (W.D.La. 1985)[1], this court finds that the Fifth Circuit did not intend to limit its holding to Jones Act cases. A holding limited to Jones Act loss of consortium claims would not necessarily have resulted in the son's award being reversed. The lower court had also found that the ship was unseaworthy, thus supporting an award of loss of consortium for the wife. Because of the finding of unseaworthiness, the child's claim for loss of society could not be precluded without

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[1] Judge Little found that a child could recover for loss of society under the general maritime law. The *Madore* language was held not to preclude a suit by the children of an injured seaman for loss of society, partly in reliance on Louisiana Civil Code article 2315. Article 2315 allows a parental loss of consortium claim to be made in state tort law cases. La. C.C. art. 2315 (West Supp. 1990). However, general maritime law is not founded on the substantive law of one state though it may be influenced by the common law. As the court stated in *DeLoach v. Compahnia de Naveqacao Lloyd Brasileiro*, 782 F.2d 438 (3d Cir. 1986), "as the common law now stands, the overwhelming majority of the states have declined to allow recovery by children for the loss of companionship caused by the negligent injury to their parents." *Id.* at 441.

considering recovery under both the Jones Act as well as general maritime law. Although the Fifth Circuit's language in the Madore opinion may seem unclear, its intent appears to have been to preclude suits for loss of society by the child of an injured seaman whether founded on Jones Act negligence or general maritime law.

Further support for this position can be found in *DeLoach v. Companhia de Naveqacao Lloyd Brasileiro*, 782 F.2d 438 (3d Cir. 1986). *DeLoach* involved a claim for damages under the general maritime law by a minor plaintiff for the loss of companionship and guidance of his father.[2]The Third Circuit looked to the common law for guidance. The court found that the overwhelming majority of states had declined to allow recovery for children for the loss of companionship of a parent. *Id.* at 441. Therefore, the common law did not provide a basis for extending the loss of consortium claim to children under general maritime law.

The court proceeded to decide whether an admiralty court had adequate reason to provide the remedy, despite the common law's denial of recovery for parental consortium. The court found that a parental loss of consortium claim was a "vague and logically expansive right. *Id.* at 443. The difficulty in determining the extent of damages as well as the arbitrariness of allowing parental loss of consortium but not loss of consortium for injury of a grandparent, sibling, or guardian convinced the court to draw a line at the spousal relationship for this type of claim. *Id.* at 442.

In light of the foregoing, this court is of the opinion that an action for parental loss of consortium should not be permitted under the general maritime law. Although Louisiana Civil Code article 2315 provides for parental loss of consortium

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[2] The plaintiff also asserted a claim for loss of parental consortium under the Longshoremen's and Harbor Worker's Compensation Act (the Act). The district court found that the Act provided no cause of action for loss of parental consortium. The plaintiff did not appeal this conclusion.

in state tort law cases, the overwhelming majority of states do not provide for this remedy. As a federal court ruling on a general maritime law issue, the substantive law of Louisiana and a few other states in allowing the remedy is not persuasive. This court prefers to adopt the reasoning of the Third and Fifth Circuits in disallowing the remedy.

Accordingly,

IT IS ORDERED that the defendant's motion to strike the loss of parental consortium claim of the Murray children is GRANTED.

New Orleans, Louisiana this 18th day of September, 1990.

/s/_____
Henry A. Mentz
United States District Judge

Date of Entry: September 20, 1990

United States District Court

Western District of Louisiana
Lafayette-Opelousas Division

RUFUS RAYBORN, JR AND HIS WIFE, MOLLIE RAYBORN

CIVIL ACTION NUMBER 90-0467

VS.

ZAPATA OFF-SHORE COMPANY AND ZAPATA CORPORATION

Filed United States District Court
Western District of Louisiana
May 2, 1991

JUDGE SHAW
MAGISTRATE JUDGE TYNES

RULING

Now before the court is a motion by defendants, Zapata Offshore Company and Zapata Corporation ("collectively Zapata"), to dismiss claims under the general maritime law for loss of consortium and society pursuant to Fed. R. Civ. P. 12(b)(6). The motion is denied.

Plaintiff's allegations are not uncommon. Mr. and Mrs. Rayborn allege that Mr. Rayborn sustained a back injury while working as a seaman aboard a jackup drilling rig owned by Zapata and located in territorial waters. Mr. Rayborn asserts a claim for negligence under the Jones Act, and for unseaworthiness under the general maritime law. Mrs. Rayborn asserts a claim for loss of consortium and society under the general maritime law.

The issue now before the court involves the reach of the Supreme Court's recent decision in *Miles* v. *Apex Marine Corp.*_____ U.S. _____, 111 S. Ct. 317, 112 L. Ed. 2d 275 (1990). More specifically, the court must determine whether *Miles* prohibits a spouse's claims for the loss of consortium and society under the general maritime law arising from the non-fatal injury of her seaman husband in territorial waters. For the reasons that follow, the court does not construe the reach of *Miles* to extend that far.

In *Miles*, the Court held "...that there is no recovery for loss of society in a general maritime action for the wrongful death of a Jones Act seaman." *Miles*, 111 S. Ct. at 326.

The *Miles* Court focused, almost exclusively, upon the development of a uniform body of law to be applied in *death* actions occurring on navigable water. The Court in *Miles* traced a history of jurisprudence and legislation which suggests that the *Miles* holding does not control, however, in cases involving nonfatal injuries under the general maritime law.

A brief review of that history is helpful. Prior to 1920, "...seamen could recover under the general maritime law for *injuries* resulting from unseaworthiness, but not negligence." *Miles*, 111 S. Ct. at 324 (citing *The Osceola*, 189 U.S. 158 (1903)). But the Court's prior holding in *The Harrisburg*, 119 U.S. 199 (1886), which prohibited a cause of action for *death* under the general maritime law, left seamen or anyone else killed on the navigable water without remedy unless the adjacent state's law happened to provide such a remedy.

In 1920, Congress enacted the Jones Act, 46 U.S.C.§ 688, and The Death on the High Seas Act, 46, U.S.C. § 761, 762 ("DOHSA").

> "The Jones Act provides an action in negligence for the death or injury of a seaman. It thereby overruled *The Osceola*, 189 U.S. 158, 47 L. Ed. 760, 23 S. Ct. 483 (1903), which established that seamen could recover under general maritime law for injuries

> resulting from unseaworthiness, but not negligence. *The Jones Act evinces no general hostility to recovery under maritime law. It does not disturb seamen's general maritime claims for injuries resulting from unseaworthiness.*" *Miles*, 111 S. Ct. at 324 (emphasis the court's).

Thus, in overruling *The Osceola*, the Jones Act only *added* to seamen's already existing remedies for injuries resulting from unseaworthiness, a new cause of action for *negligence* resulting in either injury or death. However, it did not disturb or take away from seamen any remedies for nonfatal injuries under the general maritime law.

Similarly, in enacting DOHSA, thereby creating a wrongful death action sounding in both negligence and unseaworthiness for all persons killed on the high seas, Congress only intended to provide death remedies where the Court, in *The Harrisburg*, had refused to do so. Thus "[t]he Jones Act and DOHSA established a policy in favor of maritime wrongful death recovery." *Miles*, 111 S. Ct. at 321. But, as with the Jones Act, "...no intention appears that the [Death on the High Seas] Act have the effect of foreclosing any nonstatutory federal remedies that might be found appropriate to effectuate the policies of general maritime law." *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 400 (1970).

In 1970, the Court in *Moragne* overruled *The Harrisburg*, and created a wrongful death action under the general maritime law to remedy the infamous anomalies which arose from Congress' creation of death remedies under the Jones Act and DOHSA. The "strangest" anomaly, according to *Moragne*, was that if a seaman and a longshoreman were killed in the territorial waters of a state which allowed a claim for wrongful death resulting from unseaworthiness, recovery was available for the death of a longshoreman due to unseaworthiness through the state statute, but not for the similar death of a Jones Act seaman - the traditional ward of the court. "This was because

wrongful death actions under the Jones Act are limited to negligence, and the Jones Act pre-empts state law remedies for the death or injury of a seaman."

Miles, 111 S. Ct. at 322.

Thus, in overruling *The Harrisburg*, and creating a general maritime wrongful death cause of action, the Court in *Moragne* supplemented those death remedies available under the Jones Act and DOHSA. *Moragne* simply made available in territorial waters what was already available under DOHSA on the high seas - a cause of action for death arising under the general maritime law. But, like the Jones Act and DOHSA, *Moragne* did not disturb those remedies available in cases of nonfatal injuries under the general maritime law.

Miles, for the sake of providing uniformity in the remedies available for seamen's *death* actions whether arising under the general maritime law, the Jones Act, or DOHSA, held that loss of society was not available for the death of a Jones Act seaman under the general maritime law.

From the Court's discussion of various cases decided after *Moragne*, this court concludes that *Miles* left intact all existing general maritime law remedies in cases involving nonfatal injuries. For example, *American Export Lines* v. *Alvez*, 446 U.S. 274 (1980), which held that the general maritime law authorized the wife of a harbor worker injured nonfatally aboard a vessel in state territorial waters to recover for her husband's loss of society, was cited with approval in *Miles*[1].

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[1] This court finds *Miles*' discussion of *Sea-Land Services, Inc.* v. *Gaudet*, 414 U.S. 573, 94 S. Ct. 806, 39 L. Ed. 9 (1974), particularly revealing on this point. Gaudet permitted loss of society damages for the *death* of a longshore worker killed in territorial waters. *Miles* carefully confined the holding of *Gaudet* to cases involving longshore workers and taking place in territorial waters. But in citing *Alvez*, a *nonfatal* injury case, *Miles* did not see fit to spell out any such limitations, indicating that *Alvez* is still "good law".

Relying on *Alvez*, the Fifth Circuit in *Cruz* v. *Hendy International Co.*, 638 F.2d 719 (5th Cir. 1981), partially overruled its prior holding in *Christofferson* v. *Halliburton Co.*, 534 F.2d 1147 (5th Cir. 1976) that the wife of a nonfatally injured seaman could not assert a claim for loss of consortium. The *Cruz* court reasoned that the spouse of a person entitled to recover for vessel unseaworthiness had a cause of action for loss of society because the unseaworthiness action is a product of general maritime law. *Cruz*, 638 F.2d at 725.

Cruz does not stand alone in the Fifth Circuit. In *Madore* v. *Ingram Tank Ships, Inc.*, 732 F.2d 475 (5th Cir. 1984), the court noted that although the Jones Act does not include the right to claim loss of society damages, "[t]he spouse of an injured crewmember who survives his injury may recover her loss of society in an action for unseaworthiness because such an action is based on general maritime law." Id. at 479. *See also, Tullos* v. *Resource Drilling, Inc.*, 750 F.2d 380 (5th Cir. 1985).

This court can conceive of no reason why the recovery available to the longshoreman in *Alvez* should be unavailable to the wife of Mr. Rayborn, an injured Jones Act seaman, provided that he can prove unseaworthiness. Both claims are governed by the general maritime law. What the general maritime law affords the longshoreman should certainly not exceed that available to a seaman - the traditional ward of this court. Indeed, the "strangest" anomaly that *Moragne* sought to remedy was the anomaly of a longshore worker's survivors receiving greater protection than a seaman's survivors. While *Miles* undoubtedly created just such an anomaly in the cases of seamen's *death* actions, it did so in light of the unique history of death actions occurring on navigable waters, and for the express purpose of restoring "...a uniform rule applicable to all actions for the wrongful death of a seaman whether under DOHSA, the Jones Act, or general maritime law."

Miles, 111 S. Ct. at 326.

This leaves us with a situation of allowing the wife of a seaman who survives his injuries a claim for loss of consortium while *Miles* denies the claim where the seaman does not survive. Nevertheless, we have no authority to resolve anomalies.

This court declines, therefore, to read *Miles* as extending beyond cases involving deaths to affect claims involving non-fatal injuries arising under the general maritime law, and until a higher court rules otherwise, will consider itself bound by *Alvez*, *Cruz*, *Madore*, and *Tullos*.

Accordingly, for the foregoing reasons, defendants' motion to dismiss is DENIED.

Lafayette, Louisiana, May 2nd, 1991.

/s/_____
John M. Shaw
United States District Judge

United States District Court

Western District of Louisiana
Lafayette-Opelousas Division

RUDY J. BOURQUE, ET AL

VS.

MALLARD WORKOVER AND DRILLING, INC.
CIVIL ACTION NUMBER 89-1502

Filed U.S. District Court
Western District of Louisiana
July 9th, 1991

JUDGE HAIK
MAGISTRATE JUDGE TYNES

RULING

Now before the court is a motion by defendant, Mallard Workover and Drilling, Inc., seeking dismissal of Plaintiffs' claim for loss of society and consortium.

For reasons more fully set forth in the attached ruling of *Rufus Rayborn. Jr., et al v. Zapata Off-Shore Company, et al*, Civil Action No. 90-0467, this court declines to read the Supreme Court's recent decision in *Miles v. Apex Marine Corp.*, ____, U.S. ____, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990), as extending beyond cases involving deaths. Correspondingly, this court finds that *Miles* does not affect general maritime claims involving nonfatal injuries.

Accordingly, for the foregoing reasons, it is ORDERED that the defendant's motion be DENIED.

Lafayette, Louisiana, this 9th of July, 1991.

/s/_____
Richard T. Haik
United States District Judge

MURRAY v. ANTHONY J. BERTUCCI CONST. CO., INC.

David W. MURRAY, Individually and as Administrator of the Estates of his minor children Desiree Murray, David W. Murray, Jr., Darry Scott Murray, and Sally W. Murray, Plaintiffs-Appellants,

Sally W. Murray, Plaintiff-Appellant Cross-Appellee,

v.

ANTHONY J. BERTUCCI CONSTRUCTION COMPANY, INC., and Pacific Employers Insurance Company, Defendants-Appellees Cross-Appellants.

No. 91-3044

United States Court of Appeals
Fifth Circuit

April 16, 1992.

Injured seaman brought suit under general maritime law and Jones Act. The United States District Court for the Eastern District of Louisiana, Henry A. Mentz, Jr., J., 745 F.Supp. 373, entered judgment on jury award to injured seaman and spouse, but struck jury's award of loss of society to their children. Appeal was taken by both parties. The Court of Appeals, W. Eugene Davis,-Circuit Judge, held that: (1) spouse of injured seaman did not have claim for loss of society under general maritime law; (2) injured seaman's children did not have claim for loss of society; and (3) new rule was to be applied to parties before court.

Vacated in part, affirmed in part, and remanded.

1. Admiralty (105)

Issue of whether injured seaman's spouse could recover for loss of society would be considered for the first time on appeal, where question was purely one of law decided after entry of jury verdict, and opposing party had opportunity to argue issue on appeal.

2. Husband and Wife (209(3,4))

Seaman's spouse may not recover loss of society damages under general maritime law.

3. Parent and Child (7.5)

Injured Seaman's children have no claim for loss of society under general maritime law.

4. Courts (100(1))

New rule that injured seaman's spouse and children may not recover for loss of society was to be applied to parties before Court of Appeals.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before THORNBERRY, GARWOOD, and DAVIS, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

This appeal asks us to consider, for the first time, whether the Supreme Court's decision in *Miles v. Apex Marine Corp.*, ___ U.S. ___, 111 S. Ct. 317, 112 L.Ed.2d 275 (1990), bars the spouse of an injured seaman from recovering loss of society. Cross-appellants Anthony J. Bertucci Construction Company and Pacific Employers Insurance Company (collectively "Bertucci") contend that we should reverse the jury's award to Mrs. Murray for her loss of society in light of *Miles*. Because we conclude that *Miles* properly extended, precludes an injured

seaman's spouse from recovering loss of society, we vacate the jury's award to Mrs. Murray and remand. We also consider the Murrays' appeal of the district court's decision to strike the jury's award of loss of society to their children. We conclude, however, that the court did not err in striking the children's recovery and, therefore, affirm that decision.

I.

In 1987, David W. Murray suffered a serious back injury while working as a deckhand for Bertucci aboard the M/V BARBARA ANN in Louisiana territorial waters. Following the accident, Mr. Murray sued Bertucci for negligence under the Jones Act, 46 U.S.C.App. § 688, and for unseaworthiness under general maritime law. Mr. Murray later amended his suit to add claims on behalf of his wife and children for their loss of society.

On September 11, 1990, the jury found the M/V BARBARA ANN unseaworthy and Bertucci negligent and awarded Mr. Murray $662,000. The jury also awarded Mrs. Murray $175,000 and their children $37,500 each for past and future loss of society. The district court, however, granted Bertucci's motion to strike the children's claims. *See Murray v. Anthony J. Bertucci Construction Co.*, 745 F.Supp. 373 (E.D.La.1990). The court entered judgement in accordance with the jury's verdict and its ruling on the childrens claims. After the court denied the parties' post-judgement motions, both sides filed timely appeals.

II.

[1] For the first time on appeal, Bertucci challenges Mrs. Murray's right to recover for her loss of society in view of the Supreme Court's decision in *Miles*. Ordinarily, we do not consider issues that an appellant has not raised previously in the district court. *See generally* Steven Alan Childress and Martha S. Davis, *Standards of Review* § 6.3 (1st ed. 1986) (discussing court review of issues raised for the first time on

appeal). This court has recognized, however, "that when a question is one of pure law, and when refusal to consider it would lead to an incorrect result or a miscarriage of justice, appellate courts are inclined to consider questions first raised on appeal." *Nielsen v. City of Moss Point, Mississippi*, 674 F.2d 379, 387 n. (5th Cir. 1982), *rev'd en banc on other grounds*, 701 F.2d 556 (5th Cir. 1983). *See also Empire Life Ins. Co. of America v. Valadak Corp.*, 468 F. 2d 330, 334 (5th Cir. 1972). The Supreme Court has characterized the matter of what issues a court of appeals may consider for the first time on appeal as "one left primarily to the discretion of the courts of appeals, to be exercised on the facts of the individual cases." *Singleton v. Wulff*, 428 U.S. 106, 121, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976).

The particular circumstances in this case persuade us to consider the effect of *Miles* on Mrs. Murray's right to recover, despite Bertucci's failure to present this question to the district court. Here, the Supreme Court decided *Miles* nearly two months after the jury returned its verdict and only one day before the district court entered judgement. *Cf. Hegger v. Green*, 646 F.2d 22 (2d Cir. 1981) (reversing an award for loss of consortium because an intervening state court decision held that loss of consortium damages were not recoverable in wrongful death actions).

Moreover, at the time of the district court's decision the Fifth Circuit recognized loss of society claims by spouses of seaman injured in territorial waters. *See Cruz v. Hendy Int'l Co.*, 638 F.2d 719 (5th Cir.1981). Any objection to Mrs. Murray's claim would have been in vain because the district court would have been obliged to overrule it in light of this court's clear authority in *Cruz*. As other circuits have recognized, this court should not require a party to object "'when it would not have produced any results in the trial court because a "solid wall of Circuit authority" then foreclosed the point.'" *Davis v. Mason County*, 927 F.2d 1473, 1481 (9th Cir.) (quoting *Robinson V. Heilman*, 563 F.2d 1304, 1307 (9th Cir. 1977), *cert. denied*, ____ U.S. ____, 112 S.Ct. 275, 116 L.Ed.2d 227 (1991)).

In fact, even the knowledge of the *Miles* appeal would not necessarily have given Bertucci the foresight to raise its objection earlier. The Supreme Court granted certiorari in *Miles* to consider the Fifth Circuit's decision to reaffirm its prior holding in *Sistrunk v. Circle Bar Drilling Co.*, 770 F.2d 455 (5th Cir. 1985), *cert. denied*, 475 U.S. 1019, 106 S.Ct. 1205, 89 L.Ed.2d 318 (1986). In *Sistrunk*, this court held that a *nondependent parent* could not recover for loss of society in a general maritime *wrongful death* action. *Murray*, on the other hand involves an action for personal injuries, not wrongful death, and claims by a seaman's spouse and children.

Several other factors weigh heavily in favor of considering this question. First, the question of whether *Miles* extends to loss of society claims brought by spouses of injured seaman is a "pure question of law." We need not remand this question to the district court for the determination of any factual issues because the facts here are not in dispute. Moreover, as we discuss below, we find that the proper resolution of this question in Bertucci's favor is beyond any doubt and a contrary decision would therefore constitute an injustice. *See Singleton*, 428 U.S. at 121, 96 S.Ct. at 2877; Nilsen, 674 F.2d at 387 n. 13.

Consideration of this question for the first time on appeal also does not present us with a situation where a party has not had an opportunity to argue his position. Both parties have addressed the question fully in their briefs to us and at oral argument. Mrs. Murray, therefore, has had a sufficient opportunity to develop and present her argument and would not be prejudiced if we consider the question. Finally, as the Second Circuit has observed, "[i]t is well settled that on direct review an appellate court must apply the law in effect at the time it renders its decision, unless doing so would cause manifest injustice." *Hegger*, 646 F.2d at 26 (citations omitted). *See also Empire Life Ins. Co.*, 468 F.2d at 334 ("Our duty is to enunciate the law on the record facts.").Having determined that

Bertucci's cross-appeal is properly before us, we turn to the merits of Bertucci's argument.

III.

[2] In *Miles v. Apex Marine Corp.*, the Supreme Court addressed the question of whether a nondependent parent of a seaman who was killed by a fellow crew member could recover loss of society under the general maritime law. ____ U.S. ____, 111 S.Ct. 317, 112 L.Ed.2d 275, 283 (1990). The Court held first that the general maritime law recognizes a cause of action for the wrongful death of a seaman. *Id.* at ____, ____, 111 S.Ct. at 324, 328, 112 L.Ed.2d at 289, 293-94. The Court concluded, however, that this general maritime action for a seaman's wrongful death does not include recovery for loss of society. *Id.* at ____, ____, 111 S. Ct. at 326, 328, 112 L.Ed. at 291, 294.

The present appeal concerns the implications of this second holding. More particularly, cross-appellant argues that the reasoning the Supreme Court used in *Miles* in precluding recovery of nonpecuniary damages under the general maritime law in a wrongful death action also applies to a seaman's personal injury action.According to Bertucci, that same reasoning will bar the spouse of an injured seaman from recovering nonpecuniary losses, such as a loss of society. The Murrays contend that *Miles* does not apply to an injury case and that we should uphold the jury's award of loss of society to Mrs. Murray under two earlier decisions, *American export Lines, Inc. v. Alvez*, 446 U.S. 274, 100 S.Ct. 1673, 64 L.Ed.2d 284 (1980) and *Cruz v. Hendy Int'l Co.*, F.2d 719 (5th Cir. 1981). For the reasons that follow, we agree with Mr. Bertucci that *Miles* precludes Mrs. Murray's recovery for loss of society. To explain our conclusion, however, we must first consider how the Supreme Court arrived at its holding in *Miles*.

As the Supreme Court noted in *Miles*, the Court first addressed the scope of damages recoverable in a wrongful death action brought under the general maritime law in *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 94 S.Ct. 806, 39

L.Ed.2d 9 (1974). The decedent in *Gaudet* was a longshoreman who was killed while working in state territorial waters.[1] In *Gaudet*, the Court held, *inter alia*, that a dependent plaintiff, the decedent's wife, could recover for her loss of society in a maritime wrongful death action.

Four years later, in *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed.2d 581 (1978), the Court considered the scope of recovery under the Death on the High Seas Act (DOHSA), 46 U.S.C.App. § 761 *et seq*. In declining to award loss of society damages to Higginbotham's widow, the Court limited its holding in *Gaudet* to deaths occurring in territorial waters. In *Higginbotham*, the Court concluded that, where the death occurred on the high seas, a dependent could not recover loss of society because the DOHSA specifically limited recoverable damages to pecuniary losses. The Court refused to supplement the DOHSA damages because Congress had specified the scope of damages in the act.

Nevertheless, in *Alvez*, a plurality of the Supreme Court, relying on *Gaudet*, held that an *injured* harbor worker's wife could recover loss of society damages under the general maritime law. The Court concluded that "[w]ithin this single body of judge-formulated law [i.e., general maritime law], there is no apparent reason to differentiate between fatal and nonfatal injuries in authorizing recovery of damages for loss of society." *Alvez*, 446 U.S. at 281, 100 S.Ct. at 1677.

In *Cruz*, this court was faced with the spouse of an *injured* seaman seeking to recover loss of society damages under the general maritime law. We had to decide whether Cruz's occupation as a seaman required us to deny loss of society damages to his wife even though the harbor worker's wife in *Alvez* could recover those damages. We allowed the wife to

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[1] As we will discuss in more detail later, unlike *Gaudet*, who was a longshoreman, the decedent in *Miles* and Mr. Murray, in today's case, were seamen.

recover loss of society. See *Cruz*, 638 F.2d at 725. We found "no more reason to distinguish between the types of workers whose rights stem from the same integral jurisprudence" than the *Alvez* court found to differentiate between degrees of injury. *Id.* at 724.

The Murrays rely on *Alvez* and *Cruz* and argue that *Miles* has not altered them. We disagree. First, *Miles* removed the judicial underpinning of *Alvez* and *Cruz*, on which the Murrays' argument rests. *Miles* specifically limited *Gaudet* – the starting point for *Alvez* and *Cruz* – to its facts. The Court found that the "holding of *Gaudet* applies only in territorial waters, and it applies only to longshoremen." *Miles*, – U.S. at –-, 111 S.Ct. at 325, 112 L.Ed.2d at 290. Consequently, *Miles* must have, at least implicitly, placed the same restriction on *Alvez* because that opinion merely extended *Gaudet* to personal injury actions. In fact, Justice Powell, who cast the deciding vote in *Alvez*, wrote that he "continue[d] to believe that [*Gaudet*] was decided wrongly, but recognize[d] the utility of stare decisis in cases of this kind." *Alvez*, 446 U.S. at 286, 100 S.Ct. at 1680 (Powell, J., concurring).

Moreover, our decision in *Cruz* relied on an expansive reading of both *Gaudet* and *Alvez* in holding that an injured seaman's spouse could recover for her loss of society. *Miles's* holding that only survivors of longshoremen killed in territorial waters may recover nonpecuniary damages under *Gaudet* has foreclosed, however, such an expansive reading of these two opinions. Therefore, we find that *Miles* has so undercut *Cruz's* foundations as to overrule it or render its precedential value meaningless.

Second, *Miles* espoused a strong deference to Congress and federal maritime legislation. The Court declared that:

> We no longer live in an era when seamen and their loved ones must look primarily to the courts as a source of substantive legal protection from injury and death; Congress and the States have legislated exten-

> sively in these areas. In this era, an admiralty court should look primarily to these legislative enactments for policy guidance. We may supplement these statutory remedies where doing so would achieve the uniform vindication of such policies consistent with our constitutional mandate, but we must also keep strictly within the limits imposed by Congress.

Miles, ____ U.S. at ____, 111 S.Ct. at 323, 112 L.Ed.2d at 287. We are required, therefore, to look to the Jones Act to consider the scope of the damage award for a seaman's injury.

In *Miles*, the Supreme Court considered the damage scheme Congress contemplated when it enacted the Jones Act. The court recognized that while the Jones Act "evinces no general hostility to recovery under the maritime law," *id*, at ____, 111 S.Ct. at 324, 112 L.Ed.2d at 289, courts assume that "Congress is aware of existing law when it passes legislation." *Id*. at ____, 111 S.Ct. at 325, 112 L.Ed.2d at 291. When Congress enacted the Jones Act, spouses of seamen had no general maritime right to recover for loss of society in unseaworthiness claims. *Stretton v. Penrod Drilling Co.*, 701 F.2d 441, 444 (5th Cir.1983); *Christofferson v. Halliburton Co.*, 534 F.2d 1147, 1149 (5th Cir.1976), *overruled in part by Cruz*, 638 F.2d at 725; *Branton v. Lennard Pipelines*, 1991 A.M.C. 1514, 1991 WL 40263 (E.D.La.1991). Congress incorporated the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 *et seq.*, unaltered into the Jones Act with this presumed knowledge that no remedy existed for loss of society or other nonpecuniary damages. *Miles* concluded that Congress thereby demonstrated its intent to incorporate the FELA's pecuniary limitation on wrongful death damages into the Jones Act. *See Miles*,– U.S. at –-, 111 S.Ct. at 325, 112 L.Ed.2d at 290-91. This reasoning applies with equal force to a seaman's claim for injuries. As a result, the Jones Act limits a seaman's recovery for injury to pecuniary losses and precludes any recovery for nonpecuniary losses, such as loss of society.

The Murrays ask us, therefore, to recognize damages that the general maritime law did not provide before the Jones Act's enactment and that the Jones Act itself did not sanction. We follow *Miles's* reasoning and decline, in this personal injury action, to upset the balance Congress has created in the Jones Act by allowing the recovery of damages Congress did not intend. "It would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially-created cause of action in which liability is without fault than Congress has allowed in cases of [injury] resulting from negligence." *Id.* at —-, 111 S.Ct. at 325, 112 L.Ed.2d at 291.

The Murrays argue next that we should not read *Miles* as precluding a seaman injured in state waters from recovering nonpecuniary losses. The Murrays point out the anomaly of allowing the harbor worker injured in inland waters to recover nonpecuniary losses but barring the same recovery by the seaman injured at the same location.

We acknowledge the anomaly. This anomaly results, however, from the Supreme Court's decision in Miles to limit *Gaudet* to its facts. *Miles* makes it clear that the widow of a seaman cannot recover loss of society whether the death occurs in territorial waters or on the high seas. The same result must follow in injury cases. It would make no sense to conclude that Congress intended one damage scheme for injuries occurring to seamen in state waters and another on the high seas. The Supreme Court's emphasis in *Miles* on the importance of uniformity in remedies in maritime death cases must apply equally to injury actions.

If we recognize Mrs. Murray's loss of society claim, we would create the very sort of anomaly *Miles* sought to avoid. Therefore, we follow the Supreme Court's lead in *Miles* and hold that the spouse of an injured seaman has no cause of action for loss of society under the general maritime law.[2]

IV.

[3] The Murrays also contend that the district court erred in striking their children's claim for loss of society. Having already determined that an injured seaman's spouse has no claim for loss of society, we find no reason to treat a seaman's children differently. As we discuss above, *Miles* emphasized the need to develop a uniform maritime law. It would be anomalous, indeed, to allow an injured seaman's children to recover for the nonpecuniary loss of society but to refuse such recovery to the seaman's spouse.[3]See *Robertson v. Arco Oil and Gas Co.*, 766 F.Supp. 535, 539 (W.D.La.1991) (holding that, in light of *Miles's* limitation of *Gaudet*, a dependent of a longshoreman injured on the outer continental shelf could not recover under the general maritime law for loss of society), *aff'd on other grounds*, 948 F.2d 132 (5th cir.1991).

V.

[4] Finally, the Murrays argue that even if we conclude that *Miles* bars the recovery of Mrs. Murray and the children we should not apply *Miles* retroactively under the Supreme

2 In reaching this conclusion, we observe that since *Miles* a number of district courts have considered the application of *Miles* to general maritime injury actions. Almost every court that has decided this question has held, as we do today, that *Miles* precludes recovery for loss of society. *See, e.g., Duplantis v. Texaco, Inc.*, 771 F.Supp. 787 (E.D.La.1991); *Dunbar v. American Commercial Barge Lines Co.*, 771 F.Supp. 151 (M.D.La.1991); *Branton*, 1991 A.M.C. 1514; *Breland v. Western Oceanic, Inc.*, 755 F.Supp. 718 (W.D.La.1991); *Anglada v. Tidewater, Inc.*, 752 F.Supp. 722 (E.D.La.1990). But see *Bourque v. Mallord Workover and Drilling, Inc.*, No. 89-1502 (W.D.La. July 9, 1991) (not extending *Miles*); *Rayborn v. Zapata Off-Shore Co.*, No. 90-0467 (W.D.La. May 2, 1991) (same).

3 Even in the absence of *Miles*, we would not recognize the children's claims. *See DeLoach v. Companhia de Navegacao Lloyd Brasileiro*, 782 F.2d 438 (3d Cir.1986); *Madore v. Ingram Tank Ships, Inc.*, 732 F.2d 475 (5th Cir.1984).

Court's test for retroactivity in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-107, 92 S.Ct. 349, 355-56, 30 L.Ed.2d 296 (1971). This court has recognized recently, however, that the Supreme Court's decision last term in *James B. Beam Distilling Co. v. Georgia*, —- U.S. ____, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991) (*Jim Beam*), has significantly altered the retroactivity analysis. *See In re Luce*, ____ F.2d ____, ____ No. 91-1069, slip op. at 3427 (5th Cir. Mar. 9, 1992); *Sterling v. Block*, 953 F.2d 198, 200 (5th Cir.1992). In *Jim Beam*, the Supreme Court held that "when the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata." *Jim Beam*, 111 S.Ct. at 2448.

Thus, the threshold question we face in determining whether to give *Miles* retroactive effect is whether the Supreme Court applied the rule it enunciated in *Miles* to the parties in that case. *See Sterling*, at 200. This court observed in *Sterling* that:

> In order to conclude that the rule was applied to the original parties, the earlier opinion need not explicitly address the retroactivity issue. Where the court does not explicitly decide the retroactivity question or reserve the question of whether its holding applies to the parties before it, "it is properly understood to have followed the normal rule of retroactive application in civil cases."

Id. (quoting *Jim Beam*, 111 S.Ct. at 2445).

In *Miles*, as we discuss above, the Supreme Court held that the general maritime action for wrongful death of a seaman does not include recovery for loss of society. *Miles*, ____ U.S. at ____, 111 S.Ct. at 328, 112 L.Ed.2d at 294. The Supreme Court, however, did not discuss the retroactivity of its decision or reserve that issue. Nevertheless, the Court affirmed the Fifth Circuit's denial of Mrs. Miles's recovery for loss of society. Consequently, we conclude that *Miles* "followed the normal

rule of retroactive application in civil cases" and applied the new rule to the parties before it. *Jim Beam* dictates therefore that we apply *Miles* to the parties before us in this case.

For the above reasons, Mrs. Murray's award for loss of society should be stricken. The judgment of the district court is affirmed in all other respects. We remand this case to the district court for entry of judgment consistent with this opinion.

VACATED IN PART, AFFIRMED IN PART, AND REMANDED.

Supreme Court, U.S.
FILED
AUG 17 1992
OFFICE OF THE CLERK

NO. 92-103

In the Supreme Court of the United States

OCTOBER TERM, 1992

DAVID W. MURRAY, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATES OF HIS MINOR CHILDREN, DESAREA MURRAY, DAVID W. MURRAY, JR., AND DARRYL SCOTT MURRAY, AND SALLY W. MURRAY

Petitioners

versus

ANTHONY J. BERTUCCI CONSTRUCTION CO., INC., THE M/V BARBARA ANN, AND PACIFIC EMPLOYERS INSURANCE COMPANY

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

QUESTION NUMBER 1

WHETHER THE COURT OF APPEALS CORRECTLY DETERMINED THAT *MILES V. APEX MARINE CORP.* ___ U.S. ___, 111 S.CT. 317 (1990) APPLIES WITH EQUAL FORCE TO FATAL AND NONFATAL INJURIES THUS RENDERING *AMERICAN EXPORT LINES V. ALVEZ,* 446 U.S. 274 (1980) INAPPLICABLE TO JONES ACT SEAMEN.

QUESTION NUMBER 2

WHETHER THE COURT OF APPEALS CORRECTLY DETERMINED THAT *MILES* FORECLOSES THE RECOGNITION OF A NEW CLASS OF LOSS OF SOCIETY BENEFICIARIES.

QUESTION NUMBER 3

WHETHER PETITIONERS HAVE DEMONSTRATED SPECIAL AND IMPORTANT REASONS WHICH WOULD JUSTIFY DISCRETIONARY REVIEW UNDER SUPREME COURT RULE 10.

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STATUTES APPLICABLE TO THE CASE

46 U.S.C. § 688(a):

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right to trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

46 U.S.C. § 761:

> Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

STATUTES APPLICABLE TO THE CASE (continued)

46 U.S.C. § 762:

> The recovery in such suit shall be fair and just compensation for the pecuniary loss sustained by the person for whole benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.

STATEMENT OF THE CASE

Petitioner David W. Murray brought suit under the Jones Act, 46 U.S.C. §688, *et. seq.* and the general maritime law, Art. III, Sec. 2, United States Constitution against the tug M/V BARBARA ANN, her owner, Anthony J. Bertucci Construction Company ("Bertucci"), and Bertucci's protection and indemnity underwriters, Pacific Employer's Insurance Company, alleging that he sustained injuries in the course of his employment aboard the vessel. Murray is a licensed seaman who was employed by Bertucci as a deckhand aboard the M/V BARBARA ANN, then engaged in shifting rock barges in connection with revetment work which Bertucci was performing for the United States Army Corps of Engineers near the mouth of the Mississippi River in Louisiana territorial waters. Murray was injured when he slipped and fell on unstable rock located on the starboard bow of one of the rock barges.

Murray was treated for an injury to his back which culminated in a relatively routine surgical procedure — decompressive laminectomy and spinal fusion. Murray's rehabilitation did not progress as expected, due in part to his lackluster participation in prescribed physical therapy, and he now requires numerous personal and therapeutic services, including psychiatric treatment.

By the time of the trial, Murray's suit had been amended to include loss of society claims on behalf of both his wife and his three children. Mrs. Murray's emotional testimony at trial alluded to alleged dramatic changes in lifestyle which followed Murray's surgery and focused in large part upon the various nursing and other services which she said she was required to perform.

The jury awarded Murray damages totalling $662,800 which included $62,800 for future medical expenses. [Appendix at A 4.] Bertucci did not appeal this award. The jury also awarded Mrs. Murray $175,000 for loss of services, comfort, society and attention — by twofold the largest such award arising from nonfatal injuries reported in Louisiana caselaw. [Appendix at A 5.] In addition, the jury awarded each of Murray's three minor children $37,500 for loss of services, society, comfort and attention. (The District Court had previously granted Bertucci's motion to strike the children's loss of society claims on the basis of existing Fifth and Third Circuit precedent, but submitted the claims to the jury in the event petitioners successfully appealed its ruling).

Bertucci filed its motion for new trial or, alternatively, for remittitur, on November 19, 1990 based upon the excessiveness of Mrs. Murray's damages. [Appendix at A 8-23.] The motion was denied on December 11, 1990. [Appendix at A 24-28.] Bertucci thereafter filed its notice of appeal, on January 9, 1991, [Appendix at A 29-30], and its statement of issues on appeal, on January 15, 1991, which included (1) whether the $175,000 loss of consortium award was excessive, and (2) whether the trial court committed error in denying the motion for new trial or, alternatively remittitur. [Appendix at A 31-32.] Bertucci subsequently amended its statement of issues to include whether this Court's decision in *Miles v. Apex Marine Corp.*, ___ U.S. ___, 111 S. Ct. 317 (1990) implicitly overruled the Fifth Circuit precedent which had established availability of loss of society damages to the spouse of a Jones Act seaman in the first instance. [Appendix at A 33-34.]

Following oral argument, the Fifth Circuit issued its opinion reversing the District Court's award to Mrs. Murray for loss of society damages based on this Court's decision in *Miles* and affirming the District Court's ruling bar-

ring the children's loss of society claims on the same basis. [Appendix at A 35-41.]

SUMMARY OF ARGUMENT

A. The Fifth Circuit Correctly Held That *Miles* Applies With Equal Force to Fatal and Non-Fatal Injuries.

The Fifth Circuit in *Cruz v. Hendy International Co.*, 638 F.2d 719 (5th Cir. 1981) extended the rationale of *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974) and *American Export Lines v. Alvez*, 446 U.S. 274 (1980), and created a cause of action for a spouse's loss of a non-fatally injured Jones Act seaman's society.

Miles v. Apex Marine Corp., ___ U.S. ___, 111 S. Ct. 317 (1990) expressly limited *Gaudet* (and by implication *Alvez*) to its facts based upon the premise that statutory maritime law expresses Congress' considered judgment on the appropriate damages available and that this expression of congressional intent necessarily delineates those damages available under the general maritime law, likewise limiting these to pecuniary loss.

The argument now presented by Petitioner that *Miles*' applicability should be limited to its facts — fatal injury — belies that the genesis of loss of society emerged first in the context of fatal injury and was only later extended to the non-fatal sphere, and completely disregards *Miles*' lesson that the principles of uniformity and deference to Congressional wisdom are overriding. Moreover, this Court concluded in *Miles* that it is the *Jones Act* which by implication limits recovery under the general maritime law to pecuniary loss. The Jones Act applies with equal force to fatal and non-fatal injuries. The distinction

therefore, for present purposes, between fatal and non-fatal injury, is one without a difference.

B. The Fifth Circuit Correctly Refused to Recognize A New Class of Loss of Society Beneficiaries.

Miles' reasoning applies *a fortiori* to the Murray children's claims for loss of society. Said to be inherently more speculative, claims for a child's loss of society under the general maritime law have been rejected by both circuit courts to address the issue. *Madore v. Ingram*, 732 F.2d 475 (5th Cir. 1984); *DeLoach v. Companhia de Navegacao Lloyd Brasileiro*, 782 F.2d 438 (3d Cir. 1986). The Louisiana legislature's decision to depart from the majority of states and amend its Civil Code to provide for this cause of action in no way compels or authorizes such a drastic departure from the Congressional decision to say "This much and no more." *Miles*, ____ U.S. at ____, 111 S. Ct. at 321.

C. Certiorari is Not Warranted Because No Special and Important Reasons Can be Shown For This Court to Grant Discretionary Review.

Petitioners have not and cannot show "special and important reasons" which would warrant this Court exercising discretionary review. *Miles* has barely reached the district courts. The issue came before the Fifth Circuit so quickly in the present case because this appeal was pending when the decision in *Miles* was issued. There are therefore a myriad of related issues which should be thoroughly analyzed by the lower federal courts before this Court speaks again.

ARGUMENT

The availability of loss of society damages under the general maritime law is of very recent origin. In 1976 the Fifth Circuit followed the Second Circuit's lead of over a decade before and concluded that the general maritime law *did not* permit loss of society damages for the spouse of a non-fatally injured Jones Act seaman. *Christofferson v. Halliburton Company*, 534 F.2d 1147, 1149 (5th Cir. 1976), relying in part upon *Igneri v. Cie. de Transports Oceaniques*, 323 F.2d 257 (2d Cir. 1963), *cert. denied*, 376 U.S. 949 (1964).

Only five years after deciding *Christofferson* the Fifth Circuit reversed itself in *Cruz v. Hendy International Co.*, 638 F.2d 719 (5th Cir. 1978). Both the *Christofferson* and *Cruz* cases involved non-fatally injured Jones Act seamen.[1] The only significant difference between *Christofferson* and *Cruz* was the intervention of this Court's decision in *American Export Lines v. Alvez*, 446 U.S. 274 (1980).

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[1] In *Christofferson*, the demand appears to have been for loss of "consortium" damages, although the court discusses *Gaudet* and loss of *society*, and seems to treat the two concepts interchangeably. *Christofferson*, 534 F.2d at 1150. In *Cruz*, however, the court distinguishes between loss of society and loss of consortium, expressly restricting its holding to allow only the former:

> The claimant-spouse may not recover the value of home nursing services for that is an element of damages recoverable by the injured spouse. Loss of the services that would have been provided to the marital partnership are also excluded for they are likewise embraced in the physically injured spouse's claims.

* * *

Alvez itself was indistinguishable from the *Igneri* decision, relied upon in *Christofferson*, save for the intervening decisions first in *Moragne v. States Marine Lines*, 398 U.S. 375 (1970), and then in *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974). *Alvez*, a further extension of *Gaudet*, subtly but inarguably eased *Igneri* out of existence, first tracking the evolution of the general maritime law during the intervening two decades and then concluding that *Igneri* was not in line with these developments:

> The *Igneri* opinion was carefully constructed within the framework of then-applicable doctrines governing maritime remedies. At the time, there was no clear authority sustaining a general maritime law right of recovery for loss of society.
>
> * * *
>
> Subsequent developments, however, have altered the legal setting within which we confront a claim for loss of society due to personal injury.
>
> * * *
>
> *Gaudet* held, *inter alia*, that the maritime wrongful death remedy created by *Moragne* encompassed the recovery of damages for loss of society by a decedent's widow. So, it is no longer correct to assume — as did *Igneri* — that the warranty of seaworthiness affords no relief to the spouse of a longshoreman.

Footnote 1 continued.

> [L]oss of support provided by the injured spouse is not recoverable by the claimant spouse in the loss of society action .... It necessarily follows that the spousal claim we recognize is not for loss of consortium.

Cruz, 638 F.2d at 726-27.

Alvez, 446 U.S. at 279-80 (citations omitted).

In extending the rationale of *Gaudet* beyond the sphere of fatal injuries, *Alvez* specifically addressed the distinction which petitioner attempts to draw here between fatal and non-fatal injuries and dismissed it as "logically irrelevant" without serious discussion:

> To be sure, *Gaudet* upheld a claim for loss of society in the context of a wrongful death action. But general federal maritime law is a source of relief for a longshoreman's personal injury, just as it is a source of remedy for wrongful death. Within this single body of judge-formulated law, there is no apparent reason to differentiate between fatal and non-fatal injuries in authorizing the recovery of damages for loss of society.

Alvez, 446 U.S. at 281 (citations omitted).

The Fifth Circuit in *Christofferson* had inferred a limitation of *Gaudet's* applicability to fatal injuries, but if any questions as to *Christofferson's* continued vitality existed after a reading of this passage from *Alvez*, quoted above, the Court directly answered it in a footnote:

> In *Christofferson v. Halliburton Co.*, 534 F.2d at 1150, the Court of Appeals for the Fifth Circuit inferred from that passage an intention to limit *Gaudet* to the wrongful-death context. But no such limitation is implicit. As a matter of logic, *Gaudet's* statement that double liability is precluded in wrongful-death cases is not equivalent to the proposition that *only* wrongful-death cases preclude double liability. Moreover, the *Gaudet* opinion itself noted that damages may be assessed for loss of society in personal injury cases.

Alvez, 446 U.S. at 281 n.8.

So the year following *Alvez*, when *Cruz* came to the Fifth Circuit, there was little question as to how the case would be resolved. Whereas *Alvez* involved a longshoreman while *Cruz* involved a Jones Act seaman, *Alvez* had considered *and rejected* the textualist argument, ultimately embraced in *Miles*, that the Jones Act implicitly constrains the damages available under the judge-made general maritime law.[2] *Alvez* in fact appears to have attributed the pecuniary damage limitation implicit in the Jones Act to congressional oversight and, in any case, gave it *de minimis* weight in defining the scope of available damages under general maritime law:

> The Jones Act itself was not the product of careful drafting or attentive legislative review... [A]ssuming that the statute bars damages for loss of society, it does so solely by virtue of judicial interpretation of the Federal Employees Liability Act, 45 U.S.C. § 51, *et seq.*, which was incorporated into the Jones Act. Thus, a remedial omission in the Jones Act is not evidence of considered congressional policy-making that should command our adherence in analogous contexts.

Alvez, 446 U.S. at 283-84.[3]

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[2] *Alvez*, 446 U.S. at 281-284.

[3] The Jones Act, 46 U.S.C. § 688, made applicable to seamen's claims certain substantive provisions of the Federal Employer's Liability Act ("FELA"), 45 U.S.C. §§ 51-59. Prior to the enactment of the Jones Act this Court had concluded that the damages available under the FELA did not include loss of society. *New York Central & Hudson River Railroad Co. v. Tonselito*, 244 U.S. 360 (1917). *Miles* recognized that Congress is presumed to be aware of existing law when it legislates and that by "[i]ncorporating FELA unaltered into the Jones Act, Congress must have intended to incorporate the pecuniary limitation on damages as well." *Miles*, ___ U.S. ___, 111 S. Ct. at 315 (cite omitted).

More importantly, *Alvez* was decided in 1980 and would have been an anomaly were it intended to be limited to longshoremen. Alvez's injuries occurred prior to the effective date of the 1972 amendments to the Longshoremen's and Harborworkers' Compensation Act. These amendments eliminated the warranty of seaworthiness to longshoremen by legislatively overruling *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946). Thus *Alvez* had no applicability to its own facts when this Court accepted the petition for certiorari. The Fifth Circuit recognized this and extended *Alvez* beyond its facts based in part upon its perception that a broader scope was intended.[4]

The *Cruz* court stated that it saw as little reason to distinguish "between the types of workers whose rights stem from" unseaworthiness *as to distinguish between fatal and non-fatal injuries*, concluding:

> [T]he general maritime law, a single and unitary body of jurisprudence, extends the same rights to all entitled to recover under it whether the injury occurs in territorial waters or on the high seas and...accordingly, the spouse of a person entitled to recover for unseaworthiness has a cause of action for loss of society whether the injured person was a member of a vessel crew or was for some other reason entitled to a seaworthy vessel.

Cruz, 638 F.2d at 724-25.

It thus becomes clear that the argument Petitioners now assert for *differentiating* between fatal and non-fatal injuries is disingenuous. The genesis of loss of society was in the context of fatal injury. *See Gaudet*, 414 U.S. 573. In-

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[4] *See Cruz*, 638 F.2d at 724 nn. 13,14.

deed, the very principles which warranted the extension of *Gaudet* beyond its facts (fatal injury to a longshoreman) to those at bar (non-fatal injury to a seaman) compel the conclusion that there is no logical reason to distinguish between fatal and non-fatal injuries:

> The vitality of the longshoreman is logically irrelevant once we have accepted the principle that injury suffered by a longshoreman's spouse from loss of society should be compensable, when proved. Nothing intrinsic to the *Gaudet* rule, therefore, should cabin its application to wrongful death.

Alvez, 446 U.S. at 281.[5]

Petitioners' efforts to now distinguish their loss of society cause of action from its wrongful-death roots in *Moragne* and *Gaudet* are superficial and circular. For example, Petitioners correctly argue that *Alvez* "declined the ...invitation to analogize a general maritime law remedy in a case involving a non-fatal injury to a statutory wrongful death remedy"[6] but conveniently overlook *Alvez's* criticism — indeed its reversal — of *Christofferson*. *Christofferson* was wrong *because* it inferred the distinction between fatal and non-fatal injury which Petitioners attempt to draw here. *Alvez*, 446 U.S. at 281 n. 8.

Petitioners' argument that the evolution of the wrongful-death cause of action in some way likens an

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[5] The irony of petitioner's argument becomes even more apparent when one considers that *Alvez* was a plurality opinion with Justice Powell, a dissenter in *Gaudet*, accepting *Gaudet* as *stare decisis* and concurring in *Alvez* because he saw "no rational basis for drawing a distinction between fatal and non-fatal injuries." *Alvez* 446 U.S. at 286.

[6] Petition For Writ of Certiorari at 9.

unseaworthiness claim which results in fatal injuries to DOHSA and Jones Act claims more so than an unseaworthiness claim which results in non-fatal injuries, forgets that the Jones Act applies equally to fatal and non-fatal injury. Throughout the discussion of DOHSA and the Jones Act, in fact, Petitioners mistakenly characterize the Jones Act as a "wrongful death remedy,"[7] in an apparent effort to distance Mr. Murray, a seaman, from its scope, when in fact he has recovered $662,800 for his injuries pursuant to its provisions.

Petitioners' attempts to minimize the significance of DOHSA in delimiting general maritime law damages are likewise circular. Quoting *Moragne* for the very proposition *affirmed* in *Miles* — *i.e.*, that DOHSA does not foreclose the availability of a general maritime law wrongful death cause of action[8] — Petitioners assert *Moragne* as authority for the argument that DOHSA evinces no expression of congressional judgment on the subject of available damages. Yet, *Miles* holds directly to the contrary, expressly approving *Moragne's* view that "federal admiralty law should be 'a system of law coextensive with and opera-

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[7] Petition For Writ of Certiorari at 10-11.

> Both DOHSA and the Jones Act were statutory efforts to fill the vacuum left by the absence of a wrongful death remedy at common law. Thus, this Court's decision in *Miles* to analogize the general maritime's [sic] wrongful death remedy to the statutory wrongful death remedy afforded by DOHSA *and the Jones Act* and thereby preclude loss of society damages is imminently reasonable given the historical context in which the general maritime wrongful death action was created.

Id. at 11 (emphasis ours).

[8] The first issue (of necessity) decided in *Miles* was whether *Moragne* applied beyond its facts (the death of a longshoreman). *Miles*, 111 S. Ct. at 323.

ting uniformly in, the whole country.' "[9] and concluding:

> We have described *Moragne* at length because it exemplifies the fundamental principles that guide our decision in this case. We no longer live in an era when seamen and their loved ones must look primarily to the courts as a source of substantive legal protection from injury and death; Congress and the States have legislated extensively in these areas. In this era, an admiralty court should look primarily to these legislative enactments for policy guidance.

Miles, 111 S. Ct. at 323.

Miles' emphasis on the importance of statutory law was foreshadowed in *Mobil Oil Corp. v. Higgenbotham*, 436 U.S. 618 (1978). *Higgenbotham* was the first decision to come face to face with the irreconcilable inconsistency between the Supreme Court's "policy determination" in *Gaudet* and Congress' policy decision expressed through statute.[10] Some lower courts had begun to conclude that the expanded general maritime law was meant to entirely supplant the lesser remedies available statutorily.[11]

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[9] *Moragne*, 378 U.S. at 402 quoted in *Miles*, 111 S. Ct. at 323.

[10] *Mobil Oil Corp. v. Higgenbotham*, 436 U.S. 618, 622-23 (1978).

> The *Gaudet* opinion was broadly written. It did not state that the place where death occurred had an influence on its analysis. *Gaudet* may be read, as it has been, to replace entirely the Death on the High Seas Act. Its holding, however, applies only to coastal waters. We therefore must now decide which measure of damage to apply in a death action arising on the high seas — the rule chosen by Congress in 1920 or the rule chosen by this Court in *Gaudet*.

[11] *See, e.g., Law v. Sea Drilling Corp.*, 523 F.2d 793 (5th Cir. 1975).

Higgenbotham reversed this trend, cautioning that statutory law should be the primary guide in refining the general maritime law "both because of the interest in uniformity and because Congress' considered judgment had great force in its own right."[12]

Higgenbotham did not overrule *Gaudet* but rather restricted its applicability to territorial waters, beginning the process which eventually culminated in *Miles*. *Miles* further restricted *Gaudet*, and for practical purposes has overruled it *sub silentio*, by limiting *Gaudet's* applicability to longshoremen. Longshoremen have not been owed a duty of seaworthiness, and thus have not been entitled to recovery under the general maritime law, since 1972.[13] The Court's choice to restrict *Gaudet* to its facts rather than reverse it outright was a deliberate one; *Miles* refused to similarly limit *Moragne*, which also involved a longshoreman, because to do so would mean that *Moragne* "would no longer have any applicability at all."[14]

The reason the Court chose to constrict *Gaudet* into obsolescence instead of reversing it seems clear. *Gaudet* was extended *beyond* the context of longshoremen by lower federal courts. It was unnecessary for *Miles* to expressly overrule *Gaudet* and *Alvez* because statute has done that; yet, by limiting these cases to their facts the clear message to the lower courts is that the winds have changed. Those lower court cases, like *Cruz*, which rely heavily upon the

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[12] *Higgenbotham*, 436 U.S. at 624. *Higgenbotham* involved fatal injuries to nonseamen on the high seas, thus only the Death on The High Seas Act, 46 U.S.C. § 761, and not the Jones Act, 46 U.S.C. § 688, was considered.

[13] *See* 33 U.S.C. § 905, providing the exclusive remedies available to longshoremen.

[14] *Miles*, 111 S. Ct. at 323.

concept that "the humane and liberal character of proceedings in admiralty"[15] and the historical "special solicitude"[16] to seamen exercised by the courts of admiralty compel an ever-expanding scope of general maritime law damages are now on the lee side of *Higgenbotham* and *Miles*, which counsel:

> We are not unmindful of these principles but they are insufficient in this case. We sail in occupied waters. Maritime tort law is now dominated by federal statute, and we are not free to expand remedies at will simply because it might work to the benefit of seamen and those dependent upon them.

Miles, 111 S. Ct. at 327.[17]

Finally, Petitioners' half-hearted argument that Louisiana Civil Code Article 2315.5 (allowing loss of society damages under state tort law) should be permitted to supplement federal maritime law is premised on a completely inapposite reading of *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*,[18] which simply holds that

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[15] *The Sea Gull*, 21 F. Cas. 909 (No. 12,578)(C.C.Md. 1865) cited in *Gaudet*, 414 U.S. at 583.

[16] *Moragne*, 398 U.S. at 387.

[17] *See also Higgenbotham*, 436 U.S. at 625. (When Congress "speak[s] directly to a question, the courts are not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless.").

[18] 348 U.S. 310 (1955). *Wilburn Boat* addresses the *sui generis* field of insurance regulation which Congress has expressly delegated to the states. See 15 U.S.C. § 1011 ("McCarran-Ferguson Insurance Regulation Act"). *Wilburn Boat* simply recognizes the importance of state regulation of insurance matters in the context of maritime insurance—a maritime contract. *Wilburn Boat*, 348 U.S. at 320-21. It is wholly inaplicable to the broader issue of state law supplementing the general maritime law.

state regulations governing insurance apply equally to marine insurance despite the fact that a policy of marine insurance is a "maritime contract." The rationale of *Wilburn Boat*, when extracted from the insurance context, is irreconcilable with *Miles*' emphasis on uniformity and has no place in maritime tort law.[19] Moreover, this argument is superfluous *unless Miles* has indeed so restricted Alvez as to implicitly overrule any extensions, such as *Cruz*. Otherwise, resort to state law is unnecessary.

B. The Fifth Circuit Correctly Refused to Recognize A New Class of Loss of Society Beneficiaries.

Petitioners' efforts to further extend *Alvez* to support a new class of loss of society beneficiaries — children — were properly rejected by the Fifth Circuit in view of *Miles*. Loss of society is non-pecuniary. *Miles* forecloses the availability of loss of society non-pecuniary damages before the analysis ever reaches the point at which the lower federal courts would be required to determine the proper scope of loss of society beneficiaries.

Even before *Miles*, the only two circuits to address the question had decided against the availability of children's loss of society damages. In *Madore v. Ingram Tank Ships, Inc.*, 732 F.2d 475 (5th Cir. 1984) the Fifth Circuit concluded:

> An overwhelming majority of the courts that have considered such a claim under state tort law have rejected it for various reasons. Some have relied on the argument that it is inherently

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[19] *See also Offshore Logistics v. Tallentire*, 477 U.S. 207 (1986) (holding that DOHSA does not permit supplementation of recoverable damages by state law).

> speculative to attempt to determine how much society the child has lost if his parent lives and can continue to furnish parential guidance.

Madore, 732 F.2d at 749.

The Third Circuit relied on similar reasoning in *DeLoach v. Companhia de Navegacao Lloyd Brasiliero*, 782 F.2d 432 (3d Cir. 1986). Both the Fifth and Third Circuits looked to developments in state tort law and concluded there was no support for further expanding loss of society beyond the spousal sphere.[20] *Miles* now suggests they should have looked no further than statutory maritime law.

C. Certiorari is Not Warranted Because No Special and Important Reasons Can be Shown.

Petitioners have shown no special circumstances which would warrant this Court's review. Supreme Court Rule 10 states:

> A petition for a writ of certiorari will be granted only when there are special and important reasons therefore.

The rule goes on to suggest that only an intercircuit,

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[20] *See also Miles*, ___ U.S. ___, 111 S. Ct. at 327, rejecting the argument that a "right of survival" action to recover future loss of income may be maintained pursuant to the Jones Act, noting that "[i]n only a few states can an estate recover in a survival action" and concluding "[t]his ... hardly constitutes the kind of 'wholesale' and 'unanimous' policy judgment that prompted the Court to create a new casue of action in *Moragne*," *Miles*, ___ U.S. ___, 111 S. Ct. at 327, *citing Moragne*, 398 U.S. at 388.

conflict or "far depart[ure]" from "accepted and usual...judicial proceedings" constitute such special circumstances that warrant discretionary review.

This case appears to be the first in which a circuit has had the opportunity to interpret *Miles*. In any event, there is no intercircuit conflict. Moreover, the district courts have not yet had the opportunity to fully analyze *Miles* through application.[21] For example, one aspect of *Miles* which should be more thoroughly analyzed by the lower courts before further consideration by this Court is its impact upon the availability of punitive damages, which are also non-pecuniary. Some district courts have extended *Miles* so as to preclude punitive damages.[22] The question of *Miles*' impact on the availability of punitive damages as well as the likelihood of other undiscovered ancillary issues militates in favor of further analysis among the lower courts before this Court considers these issues again.

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[21] Those which have applied *Miles* have rejected, almost uniformly, the fatal/non-fatal distinction Petitioners urge here. *See, e.g., Dunbar v. American Commercial Barge Lines Co.*, 771 F.Supp. 151 (M.D.La. 1991); *Melancon v. Petrostar Corp.*, 762 F.Supp. 1261 (W.D.La. 1991); *Fleming v. Zapata Gulf Marine Corp.*, 1991 A.M.C. 2201 (E.D.La. 1991); *Cater v. Placid Oil Co.*, 1992 A.M.C. 524 (E.D.La. 1991); *Hannon v. Waterman Steamship Corp.*, Docket No. 80-1175, 1991 WL 278996 (E.D.La. Dec. 20, 1991) (unreported); *Maxwell v. Best Workover*, Docket No. 91-0995, 1992 WL 6295 (E.D.La. Jan. 2, 1992) (unreported); *Vicknair v. Turner Well Services*, Docket No. 91-0623, 1991 WL 129816 (E.D.La. July 8, 1991) (unreported); *Skelton v. Penrod Drilling Corp.*, Docket No. 91-1456, 1991 WL 111915 (E.D.La. June 20, 1991) (unreported); *Wess v. Plaquemines Bunkers, Inc.*, Docket No. 91-1392, 1991 WL 111030 (E.D.La. June 7, 1991) (unreported); *Hornsby v. Zapata Gulf Marine Operators*, Docket No 90-2736, 1991 WL 87956 (E.D. La. May 20, 1991) (unreported); *Green v. AWI, INC.*, Docket No. 90-4387, 1991 WL 81671 (E.D.La. May 15, 1991) (unreported). This is by no means an exhaustive listing.

[22] *See, e.g., Anderson v. Texaco, Inc.*, ____ F.Supp. ____, Docket No. 90-4623, 1992 WL 160387 (E.D.La. 1992); *In Re Waterman Steamship Corp.*, 780 F.Supp. 1093 (E.D. La. 1992); *Haltom v. Lykes Steamship Co.*, 771 F.Supp. 179 (E.D. Tex. 1991); *Rollins v. Peterson Builders, Inc.*, 761 F. Supp. 943 (D.R.I. 1991).

CONCLUSION

The Fifth Circuit correctly interpreted *Miles* to foreclose the availability of loss of society damages under the general maritime law for all potential beneficiaries irrespective of the extent of injury. Further, Petitioners have not shown special and important reasons which would warrant discretionary review.

For these reasons, Respondents respectfully ask this Court to deny the petition for writ of certiorari.

Respectfully submitted,

O'NEIL, EICHIN, MILLER &
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APPENDIX A

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

DAVID W. MURRAY AND SALLY MURRAY	CIVIL ACTION
VERSUS	NO. 88-88
ANTHONY J. BERTUCCI CONSTRUCTION CO., INC., M/V BARBARA ANN, ET AL.	SECTION "I" (2)

We, the Jury, in the above-captioned action, unanimously find as follows:

1. Do you find from a preponderance of the evidence that plaintiff was involved in an accident as alleged on October 7, 1987? Answer "Yes" or "No."

Answer **Yes**

If you have answered Question No. 1 "Yes," proceed to Question No. 2. If you have answered Question No. 1 "No," proceed no further. Instead, sign and date the verdict form and inform the Marshal that you have reached a verdict.

2. Do you find from a preponderance of the evidence that the Defendant was negligent under the Jones Act? Answer "Yes" or "No."

Answer **Yes**

If you have answered Question No. 2 "Yes," proceed to

Question No. 3. If you have answered Question No. 2 "No," do not answer Question No. 3. Proceed, instead, to Question No. 4.

3. Do you find from a preponderance of the evidence that the Defendant's negligence under the Jones Act was a legal cause of the Plaintiff's injuries? Answer "Yes" or "No."

Answer **Yes**

Proceed to Question No. 4.

4. Do you find from a preponderance of the evidence that the Crane Barge AB-11 was unseaworthy at the time of Plaintiff's injury? Answer "Yes" or "No."

Answer **Yes**

If you have answered Question No. 4 "Yes," proceed to Question No. 5. If you have answered Question No. 4 "No," DO NOT answer Question No. 5. Proceed, instead, to Question No. 6 only if you have answered "Yes" to Question No. 3. If not, sign and date the verdict form and inform the Marshal that you have reached a verdict.

5. Do you find from a preponderance of the evidence that the Crane Barge AB-11's unseaworthiness was a legal cause of the Plaintiff's injury? Answer "Yes" or "No."

Answer **Yes**

Answer Question No. 6 only if you have answered "Yes" to either Question No. 3 OR Question No. 5. If you have answered "No" to either Question No. 2 OR Question No. 3 AND Question No. 5, sign and date the verdict form and

inform the Marshal that you have reached a verdict.

6. Do you find from a preponderance of the evidence that the Plaintiff was contributorily negligent? Answer "Yes" or "No."

Answer **No**

If you have answered Question No. 6 "Yes," proceed to Question No. 7. If you have answered Question No. 6 "No," skip Question No. 7 and Question No. 8. Proceed instead to Question No. 9.

7. Do you find from a preponderance of the evidence that the Plaintiff's contributory negligence was a legal cause of his injuries? Answer "Yes" or "No."

Answer _____

If you have answered Question No. 7 "Yes," proceed to Question No. 8. If you have answered Question No. 7 "No," DO NOT answer Question No. 8. Proceed, instead, to Question No. 9.

8. To what extent did the Plaintiff's contributory negligence cause his injuries? Answer in terms of a percentage (1% to 99%).

Answer _____%

Proceed to Question No. 9.

9. What amount, by a preponderance of the evidence, do you find will adequately compensate the Plaintiff for the injuries he received aboard the Crane Barge AB-11? This award should include all damages to which Plaintiff is en-

titled based upon his Jones Act and/or unseaworthiness claims. DO NOT make any reduction in the amount if you have found that the Plaintiff was negligent. If any reduction is appropriate, the Court will make it. Answer by means of a numerical figure.

(a)	Past loss of wages, if any	$ 35,000.00
(b)	Future loss of wages and meals, if any	$190,000.00
(c)	Future medical expenses, if any	$ 62,800.00
(d)	Past pain and suffering, disability, mental anguish, and loss of capacity for the enjoyment of life, if any	$100,000.00
(e)	Future pain and suffering, disability, mental anguish, and loss of capacity for the enjoyment of life, if any	$275,000.00

Proceed to Question No. 10 ONLY if you answered "Yes" to Question No. 5. If you answered "No" to Question No. 5, proceed no further. Sign and date the verdict form, and inform the Marshal that you have reached a verdict.

10. Do you find from a preponderance of the evidence that Plaintiff Sally Murray has suffered loss of her husband's services, comfort, society, and attentions in the past and in the future by reason of his injury? Answer "Yes" or "No."

Answer **Yes**

If you answered Question No. 10 "Yes," proceed to Question No. 11. If you answered "No" to Question No. 10, proceed to Question No. 12.

11. What amount, by a preponderance of the evidence, do you find will adequately compensate Plaintiff Sally Murray for the loss of her husband's services, comfort, society, and attentions in the past and in the future by reason of his injury? Answer by means of a numerical figure.

Answer $175,000.00

Proceed to Question No. 12.

12. Do you find from a preponderance of the evidence that Plaintiff, Desarea Murray, has suffered loss of her father's services, comfort, society, and attentions in the past and in the future by reason of his injury? Answer "Yes" or "No."

Answer Yes

If you answered Question No. 12 "Yes," proceed to Question No. 13. If you answered "No" to Question No. 12, proceed to Question No. 14.

13. What amount, by a preponderance of the evidence, do you find will adequately compensate Desarea Murray for the loss of her father's services, comfort, society, and attentions in the past and in the future by reason of his injury? Answer by means of a numerical figure.

Answer $ 37,500.00

Proceed to Question No. 14.

14. Do you find from a preponderance of the evidence that Plaintiff, David W. Murray, Jr., has suffered loss of his father's services, comfort, society, and attentions in the past and in the future by reason of his injury? Answer "Yes" or "No."

Answer **Yes**

If you answered Question No. 14 "Yes," proceed to Question No. 15. If you answered "No" to Question No. 14, proceed to Question No. 16.

15. What amount, by a preponderance of the evidence, do you find will adequately compensate Plaintiff, David W. Murray, Jr., for the loss of his father's services, comfort, society, and attentions in the past and in the future by reason of his injury? Answer by means of a numerical figure.

Answer **$ 37,500.00**

Proceed to Question No. 16.

16. Do you find from a preponderance of the evidence that Plaintiff, Darryl Murray, has suffered loss of his father's services, comfort, society, and attentions in the past and in the future by reason of his injury? Answer "Yes" or "No."

Answer **Yes**

If you answered "Yes" to Question No. 16, proceed to Question No. 17. If you answered "No" to Question No. 16, sign and date the verdict form and inform the Marshal that you have reached a verdict.

17. What amount, by a preponderance of the evidence, do you find will adequately compensate Plaintiff, Darryl Murray, for the loss of his father's services, comfort, society, and attentions in the past and in the future by reason of his injury? Answer by means of a numerical figure.

Answer $ 37,500.00

Please sign and date the verdict form and inform the Marshal that you have reached a verdict.

New Orleans, Louisiana, this 11th day of September, 1990.

/s/ Anthony L. Pounders

Foreperson

APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

DAVID W. MURRAY	*	CIVIL ACTION
	*	
versus	*	NO. 88-0088
	*	
ANTHONY J. BERTUCCI CONSTRUCTION CO., et al.	*	SECTION "I" (2)

MOTION FOR NEW TRIAL OR ALTERNATIVELY FOR REMITTITUR OF DAMAGES

NOW INTO COURT, through undersigned counsel, come defendants, Anthony J. Bertucci Construction Company, Inc. and Pacific Employers Insurance Company and respectfully move for a new trial or alternatively for remittitur of damages pursuant to Fed. R. Civ. P. 59(e), all as more fully set forth in the accompanying memorandum of law.

WHEREFORE, the premises considered, defendants, Anthony J. Bertucci Construction Co., Inc. and pacific Employers Insurance Company respectfully pray that an ORDER be entered granting a new trial on the issue of damages or alternatively remittitur of damages, and for all general and equitable relief afforded by the premises herein.

/s/ A.N.B. IV

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of Nov., 1990, a copy of this pleading has been served upon each other party via telefax, prepaid, and by U. S. Mail.

/s/ A.N.B. IV

OF O'Nneil, Eichin, Miller & Breckinridge

ANB/DMURRAY/NEWTRIAL.MIN

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

DAVID W. MURRAY	*	CIVIL ACTION
	*	
versus	*	NO. 88-0088
	*	
ANTHONY J. BERTUCCI CONSTRUCTION CO., et al.	*	SECTION "I" (2)

MEMORANDUM IN SUPPORT OF MOTION FOR NEW TRIAL OR ALTERNATIVELY FOR REMITTITUR OF DAMAGES

MAY IT PLEASE THE COURT:

The Court will recall that this matter was tried to a jury for five days following which a verdict was returned against defendants, A.J. Bertucci Construction Co., Inc. and Pacific Employers Insurance Company, in the total amount of $668,000 for plaintiff, David Murray, and in the amount of $175,000 for plaintiff, Sally Murray. Because these amounts are excessive and were apparently based on the jury's passion and prejudice, defendants are obliged to move for a new trial on the issue of damages or, alternatively, for remittitur.

PRELIMINARY STATEMENT

Plaintiff, David Murray, was injured when he fell on an accumulation of rock on the deck of the spud barge AB-11. He served out the remainder of his hitch and after complaining of back pain came under the care of Dr. Raeburn Llewellyn who admitted him to humana Hospital

for observation and conservative therapy on October 26, 1987. Dr. Llewellyn eventually determined that surgery was appropriate and proceeded to perform a decompression laminectomy at L4-5 accompanied by the excision of a spondylolesthetic defect at L5-S1 and a fusion performed by Dr. Kenneth Veca. Plaintiff was discharged from the hospital on December 20, 1987, ten days after the surgery. Dr. Llewellyn testified that the surgery was uneventful and that plaintiff obtained a good result. Although plaintiff has remained under Llewellyn's care due to continuing complaints of pain, Dr. Llewellyn testified that the fusion has healed solid and that he does not recommend any further surgical procedures. While Dr. Llewellyn stated on direct examination that he felt plaintiff was a chronic pain patient, he acknowledged on cross-examination that he had recommended that plaintiff undergo a course of physical therapy which he would expect to improve plaintiff's condition and that plaintiff had not done so. Dr. Llewellyn also acknowledged that programs such as the Touro Infirmary Back-in-Action Program would potentially help to alleviate plaintiff's complaints, assuming that plaintiff would faithfully complete such a program.

Plaintiff also introduced the testimony of a psychiartrist, Dr. Richard Richoux, who diagnosed plaintiff as suffering from chronic major depression primarily caused by his physical disability. This depression manifested itself in symptoms such as irritability, crying spells, and a lack of sexual appetite. Dr. Richoux also testified that while plaintiff experienced episodes of passive suicidal ideation, he did not consider plaintiff to be a suicide threat. Dr. Richoux acknowledged that plaintiff's depression symptoms should improve, particularly if he would engage in a vocational rehabilitation program within his physical limitations. There was nothing to indicate that plaintiff could not succeed in such a program and Dr. Richoux acknowledged that

plaintiff needed to initiate such activity as a first step to breaking out of his depression.

Finally, Mrs. Murray testified that prior to his accident she and her husband had an intimate and loving relationship accompanied by frequent sexual relations and that since his accident their sexual relationship was significantly limited. Mrs. Murray also testified that her husband was depressed and irritable. Finally, she stated that she was required to assist him in bathing and dressing and to provide some assistance because of bowel dysfunction.

In sum, the injury in this case involved a typical herniated intervertebral disc at L4-5 with an interbody fusion at L5-S1. Plaintiff's treating physician testified that the surgery was routine and his recovery uneventful. While plaintiff is continuing to complain of pain, his treating physician has recommended physical therapy and believes that physical therapy would be of benefit to plaintiff in relieving his symptoms. Plaintiff's treating psychiatrist is also of the view that a course of physical therapy and vocational rehabilitation would be of benefit in relieving plaintiff's symptoms of depression. While their relationship has been altered, Mrs. Murray has suffered no physical injuries. Under the circumstances, the award to Mrs. Murray in the amount $175,000 is excessive as is the general damages award to David Murray in the amount of $375,000.

SUMMARY OF POINTS AND AUTHORITIES

Defendants are mindful that the standard for granting motions for new trial on damages or, alternatively, for remittitur are exacting. The standard was most recently discussed by the Fifth Circuit in *Simeon v. T. Smith & Son., Inc.*, 852 F.2d 1421 (5th Cir. 1988) in which the court found:

> It is well settled that a jury's damages award should not be disturbed unless it is "entirely disproportionate to the injury sustained." *Caldarera v. Eastern Airlines, Inc.*, 705 F.2d 778 (5th Cir. 1988). If the jury's award is unacceptably disproportionate, either the district or appellate court should reduce the award to "the maximum amount the jury could properly have awarded." *Haley v. Pan American World Airways, Inc.*, 746 F.2d 311 (5th Cir. 1984).

Id. at 1426.

Although recognizing that a Court reviewing a quantum award should avoid being "rigidly circumscribed" by prior decisions, the *Simeon* court nevertheless sought guidance from prior cases involving comparable injuries. Concluding that the jury's pain and suffering award of $1,250,000 was excessive (plaintiff's injury involved a partially severed foot), the Fifth Circuit found that $600,000 was the maximum reasonable damage award and noted that if plaintiff would not accept a remittitur on this basis a new trial would be in order. *Id.* at 1427.

Because the awards to plaintiffs in this matter are "entirely disproportionate to the injury sustained" remittitur is in order.

The award to Mrs. Murray should be remitted to $25,000.

Defendants have exhaustively reviewed both Fifth Circuit and Louisiana decisions from 1985 to date to ascertain the loss of consortium awards to spouses whose husbands have suffered low back or similar injuries. These loss of consortium awards range from a high of $75,000 to a low of $400 but average approximately $10,000. Defendants have attached for the Court's ready reference as

Exhibit "A" a schedule providing citations to these cases and summarizing the awards. A brief discussion of some representative cases may be helpful at this point.

In *Spangler v. North Star Drilling Co.*, 552 So. 2d 673 (La. App. 2d Cir. 1989), the wife of a Jones Act seaman who underwent an MRI and two back surgeries had her loss of consortium award reduced from $75,000 to $25,000 by the Court of Appeal which noted that the accident had not caused a loss of love between the seaman and his spouse, and that the seaman and his spouse would actually be able to spend more time together after the injury because the seaman would no longer be working offshore. The court was also mindful that the couple's sexual relationship had been impaired but nevertheless determined, after reviewing the case law, that an award of $25,000 to the spouse in loss of consortium damages was appropriate.

The *Spangler* court relied on several cases in justifying the reduction of the loss of consortium claim to $25,000. For example, in *Finley v. Bass*, 478 So. 2d 608 (La. App. 2d Cir. 1985), the husband had sustained an aggravated back injury. The plaintiff proved a loss of sexual relations and potential loss of services and the Court of Appeal affirmed an award of $5,000 for loss of consortium. In *Thomas v. State Farm Insurance Co.*, 499 So. 2d 562 (La. App. 2d Cir. 1986), the injured spouse sustained a back injury which resulted in a lengthy recovery period, suffered a personality change, and was unable to prerform sexually. These allegations of course are similar to those made in the present case. the jury awarded the spouse $300,000 in loss of consortium damages but the Court of Appeal reduced that award to $20,000. Finally, in *Sexton v. Louisiana Vacuum Services, Inc.*, 506 So. 2d 780 (La. App. 1st Cir. 1987), a case where the injured spouse suffered from a variety of injuries including a cervical and lumbar strain,

contusions, fractured scapula, lacerations of the face and fractured teeth and where the injured spouse's wife testified that she had to act as a nurse in caring for him and that their sexual relationship had suffered along with a decline in their social life, the Court of Appeal affirmed the $10,000 loss of consortium award.

The highest loss of consortium award in a case involving injuries similar to David Murray's was in the amount of $75,000. *Tracy v. Jefferson Parish*, 523 So. 2d 266 (La. App. 5th Cir. 1988). In that case, the husband was severly injured and disabled, the marriage of the couple deteriorated to the point where the wife sought counsel from a psychiatrist and she reported that she had no hopes of having children as a result of the injury. The *Spangler* court noted these "special circumstances" particularly the wife's lost hope of having children as justifying a $75,000 award. These circumstances do not exist in this case inasmuch as the Murrays already have three children.

The court may recall that Mrs. Murray made a rather dramatic appearance on the witness stand as she cried practically throughout the entirety of her testimony. This undoubtedly served to inflame the jury resulting in their inflated award. Defendants have found only one case, *Tracy*, in which a loss of consortium award was as high as $75,000. The *average* award for all loss of consortium cases involving low back injuries during this time period is approximately $10,000. Like the spouse in *Spangler*, Mrs. Murray will have the benefit of her husband's presence to a greater extent following his accident than she did before his accident when he was offshore a majority of the time. Moreover, the medical testimony is to the effect that Mr. Murray's physical condition should improve once he begins to engage in therapy and his psychiatrist testified that this should also serve to improve his symptoms of depression.

In reviewing the damage award, the Court should remember that this incident involves a single lumbar laminectomy and fusion, a surgical procedure which plaintiff's own neurosurgeon testified was routine and from which plaintiff recovered uneventfully. Although he continues to complain of pain, this is not a case involving multiple surgeries or a case involving such damage to the spinal column as to render a plaintiff paraplegic. This is a simple back case and the loss of consortium award in the amount of $175,000 is manifestly excessive. Considering the defendants' research has revealed only one case involving low back injuries in which a loss of consortium award was as much as $75,000, and further considering that loss of consortium awards in such cases average $10,000, it is respectfully urged that the *maximum* recoverable award for Mrs. Murray under these circumstances is $25,000.

The general damages award to David Murray of $375,000 is excessive and should be reduced to $250,000.00.

While defendants acknowledge that the question whether to reduce David Murray's general damages award presents a closer issue than that presented by Mrs. Murray's loss of consortium award (which is substantially beyond the bounds of maximum recovery), defendants nevertheless urge the Court to carefully scrutinize the general damages award to Mr. Murray. The Court will recall that Mr. Murray underwent *a single surgical procedure* involving a laminectomy and lumbar fusion. The *Spangler, supra*, court considered a more serious injury that required plaintiff to undergo three separate myelograms, an MRI and two back surgeries and reduced a general damages award from $600,000 to $375,000. The court observed as follows:

Typically, awards between $125,000 to $175,000

> are usually allowed in cases where the plaintiff has sustained a back injury and has undergone a *single back surgery*. This range of recovery is usually associated in cases where the plaintiff has undergone a disclaminectomy and a fusion of his spine and the same operatio. *See Wactor v. Pickens Lumber*, 505 So. 2d 815 (La. App. 2d Cir. 1987) and the cases cited therein. (Emphasis supplied.)

Spangler, supra, at 682.

Because the plaintiff in *Spangler* had undergone two surgeries, the court felt that the award of $375.000 was the maximum allowable. Plaintiff in this case has undergone only one surgery. The Fifth Circuit has not hesitated to reduce excessive awards in similar cases. In the recent case of *Williams v. Chevron USA, Inc.*, 875 F.2d 501 (5th Cir. 1989), the Fifth Circuit reduced a general damages award from $400,000 to $200,000 in a case involving a single level cervical laminectomy and fusion. In support of its decision, the court cited its previous decision in *Holmes v. J. Ray McDermott & Co., Inc.*, 734 F.2d 1110 (5th Cir. 1984) in which it affirmed a general damages award of less than $180,000 to a plaintiff who had suffered a herniated *lumbar* disc necessitating one surgery and who complained of suffering from continual pain and discomfort and, according to a psychologist, suffered ongoing depression. The court noted that this award was "very generous but not shocking to our conscience." *Id.* at 1119. David Murray's injury and recovery are almost identical to that described by the court in *Holmes*. Mr. Murray has undergone a single surgical procedure, continues to complain of pain and discomfort, and has been diagnosed as suffering from depression. The *Holmes* court described an award of less than $180.000 under similar circumstances as being "very generous."

An award of $375,000 in general damages to David Murray is simply outside the maximum allowable for such an injury. Indeed, in *Myers v. Griffin-Alexander Drilling Co.*, 910 F.2d 1252 (5th Cir. 1990), the Fifth Circuit indicated that an award in general damages of $185,000 was appropriate in a case involving a herniated lumbar disc requiring one surgical procedure. *See also Cooper v. Offshore Express, Inc.*, 717 F. Supp. 1180 (W.D. La. 1989) in which Judge Scott awarded $150,000 in general damages to a Jones Act seaman who had undergone a lumbar laminectomy and whose prognosis with respect to continuing and future pain and discomfort was described by his physician as fair to poor. The plaintiff also, like Mr. Murray, had symptoms of psychological overlay. Nevertheless, Judge Scott felt that $150,000 was sufficient compensation under the circumstances. *Id.* at 1188. Considering that Mr. Murray has undergone a single routine surgical procedure and that his physicians have indicated that his condition may improve if he will engage in a course of physical and vocational rehabilitation therapy, an award of $250,000 in general damages would constitute the maximum allowable recovery. Such a finding would reduce Mr. Murray's total award to $543,000 which is a more than ample award under the circumstances.

CONCLUSION

The Court will recall that this trial was vigorously contested and involved a number of emotional moments, particularly when Mrs. Murray cried during her direct examination. This undoubtedly incited the jury to return excessive awards. The loss of consortium award to Mrs. Murray of $175,000 is clearly beyond the outer limits of reasonableness not only in view of the facts of the case but also in view of previous awards in similar cases. The general damages award to Mr. Murray of $375,000, while

presenting a slightly closer case, should be subject to the Court's closest scrutiny following which defendants respectfully urge that it should be reduced to $250,000, which constitutes the maximum allowable recovery for a lumbar disc injury necessitating a single surgery. In so doing, the Court would nevertheless leave the Murrays a total award of $568,000 which would fully and adequately compensate them for the injuries sustained in the case.

Respectfully submitted,

/s/ A.N.B. IV

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of Nov., 1990, a copy of this pleading has been served upon each other party via telefax, prepaid, and by U. S Mail.

/s/ A.N.B. IV

OF O'Nneil, Eichin, Miller & Breckinridge

ANB/MURRAY/NEWTRIAL.SPT.

ATTACHMENT

Case	Injury
Romaire v. Winn-Dixie 478 So.2d 971 (1985)	Lumbar strain, fractured coccyx, wrist sprain
DeVille v. K-Mart 498 So. 2d 1122 (1986)	15 % knee disability 20-25% back disability
Morris v. Highlands 525 So.2d 179 (1988)	Degenerative disc disease
Comeaux v. Poindexter 527 So. 2d 1184	Cervical strain psychological problems
Whitehead v. Fireman's Fund 529 So. 2d 82	Cervical strain
Mims v. Reliance Ins. Co. 535 So. 2d 1085	Aggravation of disc disease; neck and back pain
Peterson v. Western World Insurance Co. 536 So. 2d 639	Comporession fracture lumbar spine; fractured right ankle, left heel

ATTACHMENT

Cause	Loss of Consortium	Year
Slip and fall 47-year old housewife	$4,000.00 ($19,000 total)	11/12/85
Slip and fall convenience store employee	$75,866.00 ($350,000 total)	12/20/86
Auto accident housewife	$10,000 ($50,000 gen. damages) ($12,421 special damages)	1988
Auto accident	$15,000.00 ($40,000 gen. damages) ($11,852 special damages)	1988
Auto accident	$5,625.00 ($21,000 gen. damages) ($17,500 special damages)	1988
Auto accident 63-year old maid	$400.00	1988
Fall from water tank- 39 year old businessman	$25,000.00 ($400,000 gen. damages) ($131,586 special damages)	1988

ATTACHMENT (continued)

Case	Injury
Soudelier v. Miller 537 So. 2d 296	Bulging cervical disc; permanent nerve injury
Kumble v. Wal-Mart Stores 539 So.2d 1212	Neck and arm pain, swelling in back
Fuller v. Moser 539 So. 2d 784	Neck injury
Vaccaro v. Sports *& Imports* 539 So. 2d 989	Cervical strain disc bulge
Thomas v. Hartford *Ins. Co.* 540 So. 2d 1068	Cervical strain, eye abrasion, arm pain
Bergeron v. K-Mart 540 So. 2d 406	Head and neck, herniated disc at C3-C4-C5, cervical fusions
Henry v. National 542 So. 2d 102	Bulging cervical discs C5-C6-C7
Fuqua v. Aetna 542 So. 2d 1129	Spinal cord contusion, broken neck

ATTACHMENT (continued)

Cause	Loss of Consortium	Year
Auto accident	$5,000.00 ($60,000 gen. damages) ($190,000 special damages)	1988
Slip and fall 24-year old spouse	$10,000.00 ($50,000 gen. damages) ($35,533 special damages)	
Auto accident	$5,000.00 ($5,000 gen. damages) ($796 special damages)	1989
Auto accident 40-year old woman with 2 children	$25,000.00 ($75,000 gen. damages)	1989
Truck accident	$5,000 ($40,000 gen. damages) ($9,352 special damages)	1989
Slip and fall 34-year old hus- band and children	$10,000 ($60,000 gen. damages) ($66,000 special damages)	1989
Auto accident 22-year old nurse	$5,000.00 ($65,000 gen. damages) ($115,000 special damages)	1989
Auto accident	$13,000.00 ($402,000 gen. damages) ($215,000 special damages)	1989

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

DAVID W. MURRAY	*	CIVIL ACTION
	*	
versus	*	NO. 88-0088
	*	
ANTHONY J. BERTUCCI CONSTRUCTION CO., et al.	*	SECTION "I" (2)

NOTICE OF MOTION

TO: **Mr. John W. deGravelles**
deGravelles, Palmintier & Holthaus
628 St. Louis Street
Baton Rouge, Louisiana 70802

PLEASE TAKE NOTICE that defendants, Anthony J. Bertucci Construction Co., Inc. and Pacific Employers Insurance Company, will bring on for hearing their motion for new trial or alternatively for remittitur of damages before the Hon. Henry A. Mentz on Wednesday, December 5, 1990 at 9:00 A.M., United States District Court, Eastern District of Louisiana, 500 Camp Street, New Orleans, Louisiana or as soon thereafter as counsel may be heard.

/s/ A.N.B. IV

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of Nov., 1990, a copy of this pleading has been served upon each other party via telefax, prepaid, and by U. S. Mail.

/s/ A.N.B. IV

OF O'Nneil, Eichin, Miller & Breckinridge

ANB/DMURRAY/NEWTRIAL.NTC

APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

Filed Dec 11 1990

DAVID W. MURRAY and SALLY MURRAY	CIVIL ACTION
VERSUS	NO. 88-88
ANTHONY J. BERTUCCI CONSTRUCTION CO., ET AL	SECTION "I" (2)

ORDER AND REASONS

The court has before it two motions: a motion for alteration or amendment of judgment or alternatively for partial new trial on the issue of award for children's loss of consortium filed by the plaintiffs (the Murrays); and a motion for new trial or alternatively for remittitur of damages filed by the defendant (Bertucci).

I. CHILDREN'S LOSS OF CONSORTIUM CLAIM

The plaintiff has urged the court to reconsider its earlier ruling denying the Murray children a claim for loss of consortium. After such reconsideration, the court adheres to its original ruling denying the claim for the reasons given in its memorandum opinion on the issue.

II. MOTION FOR NEW TRIAL OR REMITTITUR OF DAMAGES

At the conclusion of a five-day trial, the jury returned a verdict for David Murray in the amount of $668,000

Date of Entry
DEC 13 1990

and for Sally Murray in the amount of $175,000. Bertucci argues that the general damages award of $375,000 awarded to David Murray and the $175,000 loss of consortium award to Sally Murray are excessive. It urges the court either to grant a new trial or to grant a remittitur.

A review of the facts of the case shows that David Murray fell on some rocks that had accumulated on the deck of the barge on which he was working. He was treated by Dr. Raeburn Llewellyn who performed a decompression laminectomy at L4-5 accompanied by the excision of a spondylolesthetic defect at L5-S1 and a fusion performed by Dr. Kenneth Veca. The fusion has healed solid and further surgery is not recommended. Despite the apparent success of the surgery, David Murray suffers from chronic pain. The plaintiff's physicians attribute the pain to formation of scar tissue. He is unable to dress himself without assistance; he is unable to walk or stand for any length of time without the use of a cane; he must wear a back brace or TENS unit; he is unemployable; he cannot drive a car or perform any household chores. Furthermore, he is unable to have normal sexual relations with his wife and must rely on her assistance to have a bowel movement. The constant pain and inability to care for himself have caused David Murray to become severely depressed and occasionally even suicidal.

The defendant introduced expert testimony that indicated physical therapy might provide some relief to David Murray. However, plaintiff's experts indicated that David Murray would not make any significant improvement if he entered a course of physical therapy. In their opinion, David Murray would experience pain for the rest of his life and would require the assistance of another person to perform his daily activities.

The result of this case indicates to the court that the jury found the plaintiff's expert more persuasive. Although David Murray had only one back surgery, he still suffers from unremitting and debilitating back pain. The court finds this case to be similar to *Andrews v. Mosley Well Service*, 514 So. 2d 491 (La. Ct. App. 3d Cir. 1987). The plaintiff, Andrews, suffered an injury to his back that required a decompression surgery. Six months after the surgery, the time of maximum cure, Andrews was still suffering pain and disability. Andrew's doctors testified that he could never return to manual labor, he could not stoop, bend, lift, pull, or climb, nor could he sit or stand for long periods of time. His condition was permanent. Andrews received $400,000 in general damages.

In light of the *Andrews* decision, the court finds that the $375,000 award for general damages given to David Murray is not "entirely disproportionate to the injury sustained." *Simeon v. T. Smith & Son, Inc.*, 852 F.2d 1421, 1426 (5th Cir. 1988) (quoting *Caldarera v. Eastern Airlines*, 705 F.2d 778 (5th Cir. 1988)).

The court likewise finds that the award to Sally Murray is not so disproportionate as to require a new trial or a remittitur. After David Murray's accident, the relationship between the Murray's changed from that of husband-wife to that of mother-child. Mr. Murray became incapable of aiding his wife around the house; of working and supporting his wife; of engaging in sexual relations with his wife; and of caring for himself on a daily basis. Mr. Murray also suffers from severe depression, which makes the "*relationship between the Murrays that much more difficult.*"

To argue, as does the defendant, that $25,000 will

compensate Sally Murray for her losses in ludicrous. According to the plaintiff's doctors, David Murray has become almost physically useless and greatly impaired mentally due to his depression; Sally Murray is no longer living with the same man she married. His condition is likely to be permanent.

Accordingly,

IT IS ORDERED that the the plaintiffs' motion for alteration of judgment or alternatively for partial new trial on the issue of award for children's loss of consortium is DENIED.

IT IS FURTHER ORDERED that the defendant's motion for new trial or alternatively for remittitur of damages is DENIED and the hearing scheduled on the motions for DECEMBER 5, 1990 is CANCELED.

New Orleans, Louisiana this 11th day of December, 1990.

/s/ Henry A. Mentz

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

Filed Dec 17 1990

MINUTE ENTRY
DECEMBER 14, 1990
MENTZ, J.

DAVID W. MURRAY and SALLY MURRAY	CIVIL ACTION
VERSUS	NO. 88-88
ANTHONY J. BERTUCCI CONSTRUCTION CO., ET AL	SECTION "I" (2)

It has been brought to the court's attention that a line was inadvertently left out of this court's order and reasons dated December 11, 1990.

Accordingly,

IT IS ORDERED that the order and reasons dated December 11, 1990 be AMENDED and the following phrase be inserted at the bottom of page three: "relationship between the Murrays that much more difficult."

Clerk to serve all counsel.

DATE OF ENTRY
DEC 17 1990

APPENDIX D

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

Filed Jan 9 1991

DAVID W. MURRAY	*	CIVIL ACTION
and SALLY MURRAY	*	
	*	NO. 88-0088
versus	*	
	*	SECTION "I" (2)
	*	
ANTHONY J. BERTUCCI	*	
CONSTRUCTION CO. and	*	
PACIFIC EMPLOYERS	*	
INSURANCE COMPANY	*	

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that defendants, Anthony J. Bertucci Construction Company and Pacific Employers Insurance Company hereby appeal to the United States Court of Appeals for the Fifth Circuit from that portion of the judgment entered on November 7, 1990 in favor of plaintiff, Sally Murray, in the amount of $175,000.00 for her loss of consortium claim and from the district court's order entered December 13, 1990 denying defendant's motion for new trial or alternatively remittitur of plaintiff's loss of consortium award.

New Orleans, Louisiana, this 9th day January, 1991.

/s/ A.N.B. IV

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of January, 1991, a copy of this pleading has been served upon each other party to this action by depositing same in the United States mails properly addressed to his, her, or its counsel of record, first class postage prepaid.

/s/ A.N.B. IV

OF O'Neil, Eichin, Miller & Breckinridge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

Filed Jan 15 1991

DAVID W. MURRAY	*	CIVIL ACTION
and SALLY MURRAY	*	
	*	
versus	*	
	*	NO. 88-0088
	*	
ANTHONY J. BERTUCCI	*	SECTION "I" (2)
CONSTRUCTION CO. and	*	
PACIFIC EMPLOYERS	*	
INSURANCE COMPANY	*	

STATEMENT OF ISSUES TO BE PRESENTED ON APPEAL BY APPELLANTS ANTHONY J. BERTUCCI CONSTRUCTION COMPANY, INC. AND PACIFIC EMPLOYERS INSURANCE COMPANY

NOW INTO COURT, through undersigned counsel, come defendants/appellants, Anthony J. Bertucci Construction Company, Inc. and Pacific Employers Insurance Company, and pursuant to F.R.A.P. 10(b)(3) respectfully submit the following statement of the issues to be presented on appeal:

1. Whether the award in the amount of $175,000.00 to plaintiff, Sally Murray, in connection with her loss of consortium claim was excessive.

2. Whether the district court committed error in denying defendants' motion for new trial, or alternatively, for remittitur on the issue of the excessiveness of the loss of consortium award to plaintiff, Sally Murray.

Respectfully submitted,

/s/ A.N.B. IV

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of January, 1991, a copy of this pleading has been served upon each other party to this action by depositing same in the United States mails properly addressed to his, her, or its counsel of record, first class postage prepaid.

/s/ A.N.B. IV

OF O'Neil, Eichin, Miller & Breckinridge

APPENDIX E

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

Filed Feb 19 1991

DAVID W. MURRAY and SALLY MURRAY	*	CIVIL ACTION
versus	*	NO. 88-0088
ANTHONY J. BERTUCCI CONSTRUCTION CO. and PACIFIC EMPLOYERS INSURANCE COMPANY	*	SECTION "I" (2)

SUPPLEMENTAL AND AMENDED STATEMENT OF ISSUES TO BE PRESENTED ON APPEAL BY APPELLANTS ANTHONY J. BERTUCCI CONSTRUCTION COMPANY, INC. AND PACIFIC EMPLOYERS INSURANCE COMPANY

NOW INTO COURT, through undersigned counsel, come defendants/appellants, Anthony J. Bertucci Construction Company, Inc. and Pacific Employers Insurance Company, and pursuant to F.R.A.P. 10(b)(3) respectfully supplement and amend their statement of issues to be presented on appeal as follows:

3. Whether the spouse of an injured seaman has a cause of action for loss of consortium and society under the general maritime law of the Supreme Court's recent decision in *Miles v. Apex Marine Corp.*, ___ U.S. ___, 111 S. Ct. 317 (1990). *See, Anglada v. Tidewater, Inc.*, C.A. 90-1638 (E.D.La. Feldman, J., 1990).

Respectfully submitted

/s/ A.N.B. IV

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of January, 1991, a copy of this pleading has been served upon each other party to this action by depositing same in the United States mails properly addressed to his, her, or its counsel of record, first class postage prepaid.

/s/ A.N.B. IV

OF O'Neil, Eichin, Miller & Breckinridge

APPENDIX F

David W. MURRAY, Individually and as Administrator of the Estates of his minor children Desiree Murray, David W. Murray, Jr., Darry Scott Murray, and Sally W. Murray,

Plaintiffs-Appellants,

Sally W. Murray,

Plaintiff-Appellant

Cross-Appellee,

v.

ANTHONY J. BERTUCCI CONSTRUCTION COMPANY, INC., and Pacific Employers Insurance Company,

Defendants-Appellees

Cross-Appellants.

No. 91-3044.

United States Court of Appeals, Fifth Circuit.

April 16, 1992.

Injured seaman brought suit under general maritime law and Jones Act. The United States District Court for the Eastern District of Louisiana, Henry A. Mentz, Jr., J., 745 F.Supp. 373, entered judgment on jury award to injured seaman and spouse, but struck jury's award of loss of society to their children. Appeal was taken by both parties. The Court of Appeals, W. Eugene Davis, Circuit Judge, held that: (1) spouse of injured seaman did not have

claim for loss of society under general maritime law; (2) injured seaman's children did not have claim for loss of society; and (3) new rule was to be applied to parties before court.

Vacated in part, affirmed in part, and remanded.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before THORNBERRY, GARWOOD and DAVIS, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

This appeal asks us to consider, for the first time, whether the Supreme Court's decision in *Miles v. Apex Marine Corp.*, ___ U.S. ___, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990), bars the spouse of an injured seaman from recovering loss of society. Cross-appellants Anthony J. Bertucci Construction Company and Pacific Employers Insurance Company (collectively "Bertucci") contend that we should reverse the jury's award to Mrs. Murray for her loss of society in light of *Miles*. Because we conclude that *Miles*, properly extended, precludes an injured seaman's spouse from recovering loss of society, we vacate the jury's award to Mrs. Murray and remand. We also consider the Murrays' appeal of the district court's decision to strike the jury's award of loss of society to their children. We conclude, however, that the court did not err in striking the children's recovery and, therefore, affirm that decision.

I.

In 1987, David W. Murray suffered a serious back injury while working as a deckhand for Bertucci aboard the

M/V BARBARA ANN in Louisiana territorial waters. Following the accident, Mr. Murray sued Bertucci for negligence under the Jones Act, 46 U.S.C.App. § 688, and for unseaworthiness under the general maritime law. Mr. Murray later amended his suit to add claims on behalf of his wife and children for their loss of society.

On September 11, 1990, the jury found the M/V BARBARA ANN unseaworthy and Bertucci negligent and awarded Mr. Murray $662,000. The jury also awarded Mrs. Murray $175,000 and their children $37,500 each for past and future loss of society. The district court, however granted Bertucci's motion to strike the children's claims. *See Murray v. Anthony J. Bertucci Construction Co.*, 745 F.Supp. 373 (E.D.La.1990). The court entered judgment in accordance with the jury's verdict and its ruling on the children's claims. After the court denied the parties' post-judgment motions, both sides filed timely appeals.

II.

[1] For the first time on appeal, Bertucci challenges Mrs. Murray's right to recover for her loss of society in view of the Supreme Court's decision in *Miles*. Ordinarily, we do not consider issues that an appellant has not raised previously in the district court. *See generally* Steven Alan Childress and Martha S. Davis, *Standards of Review* § 6.3 (1st ed. 1986) (discussing court review of issues raised for the first time on appeal). This court has recognized, however, that "when a question is one of pure law, and when refusal to consider it will lead to an incorrect result or a miscarriage of justice, appellate courts are inclined to consider questions first raised on appeal." *Nilsen v. City of Moss Point, Mississippi*, 674 F.2d 379, 387 n. 13 (5th Cir.1982), *rev'd en banc on other grounds*, 701 F.2d 556 (5th Cir.1983). *See also Empire Life Ins. Co. of America v.*

Valdak Corp., 468 F.2d 330, 334 (5th Cir.1972). The Supreme Court has characterized the matter of what issues of a court of appeals may consider for the first time on appeal as "one left primarily to the discretion of the courts of appeals, to be exercised on the facts of the individual cases." *Singleton v. Wulff*, 428 U.S. 106, 121, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976).

The particular circumstances in this case persuade us to consider the effect of *Miles* on Mrs. Murray's right to recover, despite Bertucci's failure to present this question to the district court. Here, the Supreme Court decided *Miles* nearly two months after the jury returned its verdict and only one day before the district court entered judgment. *Cf. Hegger v. Green*, 646 F.2d 22 (2d Cir.1981) (reversing an award for loss of consortium because an intervening state court decision held that loss of consortium damages were not recoverable in wrongful death actions).

Moreover, at the time of the district court's decision, the Fifth Circuit recognized loss of society claims by spouses of seamen injured in territorial waters. *See Cruz v. Hendy Int'l Co.* 638 F.2d 719 (5th Cir.1981). Any objection to Mrs. Murray's claim would have been in vain because the district court would have been obliged to overrule it in light of this court's clear authority in *Cruz*. As other circuits have recognized, this court should not require a party to object " 'when it would not have produced any results in the trial court because a "solid wall of Circuit authority" then foreclosed the point.' " *Davis v. Mason County*, 927 F.2d 1473, 1481 (9th Cir.) (quoting *Robinson v. Heilman*, 563 F.2d 1304, 1307 (9th Cir.1977), *cert. denied*, ____ U.S. ____, 112 S.Ct. 275, 116 L.Ed.2d 227 (1991)).

In fact, even knowledge of the *Miles* appeal would not necessarily have given Bertucci the foresight to raise

its objection earlier. The Supreme Court granted certiorari in *Miles* to consider the Fifth Circuit's decision to reaffirm its prior holding in *Sistrunk v. Circle Bar Drilling Co.*, 770 F.2d 455 (5th Cir.1985), *cert. denied*, 475 U.S. 1019, 106 S.Ct. 1205, 89 L.Ed.2d 318 (1986). In *Sistrunk*, this court held that a *nondependent parent* could not recover for loss of society in a general maritime *wrongful death* action. *Murray*, on the other hand, involves an action for personal injuries, not wrongful death, and claims by a seaman's spouse and children.

Several other factors weigh heavily in favor of considering this question. First, the question of whether *Miles* extends to loss of society claims brought by spouses of injured seamen is a "pure question of law." We need not remand this question to the district court for the determination of any factual issues because the facts here are not in dispute. Moreover, as we discuss below, we find that the proper resolution of this question in Bertucci's favor is beyond any doubt and a contrary decision would therefore constitute an injustice. *See Singleton*, 428 U.S. at 121, 96 S.Ct. at 2877; *Nilsen*, 674 F.2d at 387 n. 13.

Consideration of this question for the first time on appeal also does not present us with a situation where a party has not had an opportunity to argue his position. Both parties have addressed this question fully in their briefs to us and at oral argument. Mrs. Murray, therefore, has had a sufficient opportunity to develop and present her argument and would not be prejudiced if we consider this question. Finally, as the Second Circuit has observed, "[i]t is well settled that on direct review an appellate court must apply the law in effect at the time it renders its decision, unless doing so would cause manifest injustice." *Hegger*, 646 F.2d at 26 (citations omitted). *See also Empire Life Ins. Co.*, 468 F.2d at 334 ("Our duty is to enunciate the law on

the record facts."). Having determined that Bertucci's cross-appeal is properly before us, we turn to the merits of Bertucci's argument.

III.

[2] In *Miles v. Apex Marine Corp.*, the Supreme Court addressed the question of whether a nondependent parent of a seaman who was killed by a fellow crew member could recover loss of society under the general maritime law. ____ U.S. ____, 111 S.Ct. 317, 112 L.Ed.2d 275, 283 (1990). The Court held first that the general maritime law recognizes a cause of action for the wrongful death of a seaman. *Id.* at ____, ____, 111 S.Ct. at 324, 328, 112 Ed.2d at 289, 293-94. The Court concluded, however, that this general maritime action for a seaman's wrongful death does not include recovery for loss of society. *Id.* at ____, ____, 111 S.Ct. at 326, 328, 112 L.Ed.2d at 291, 294.

The present appeal concerns the implications of this second holding. More particularly, cross-appellant Bertucci argues that the reasoning the Supreme Court used in *Miles* in precluding recovery of nonpecuniary damages under the general maritime law in a wrongful death action also applies to a seaman's personal injury action. According to Bertucci, that same reasoning will bar the spouse of an *injured* seaman from recovering nonpecuniary losses, such as loss of society. The Murrays contend that *Miles* does not apply to an injury case and that we should uphold the jury's award of loss of society to Mrs. Murray under two earlier decisions, *American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 100 S.Ct. 1673, 64 L.Ed.2d 284 (1980) and *Cruz v. Hendy Int'l Co.*, 638 F.2d 719 (5th Cir.1981). For the reasons that follow, we agree with Bertucci that *Miles* precludes Mrs. Murray's recovery for loss of society. To explain our conclusion, however, we must first consider how

the Supreme Court arrived at its holding in *Miles*.

As the Supreme Court noted in *Miles*, the Court first addressed the scope of damages recoverable in a wrongful death action brought under the general maritime law in *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9 (1974). The decedent in *Gaudet* was a longshoreman who was killed while working in state territorial waters.[1] In *Gaudet*, the Court held, *inter alia*, that a dependent plaintiff, the decedent's wife, could recover for her loss of society in a maritime wrongful death action.

Four years later, in *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed.2d 581 (1978), the Court considered the scope of recovery under the Death on the High Seas Act (DOHSA), 46 U.S.C.App. § 761 *et seq.* In declining to award loss of society damages to Higginbotham's widow, the Court limited its holding in *Gaudet* to deaths occurring in territorial waters. In *Higginbotham*, the Court concluded that, where the death occurred on the high seas, a dependent could not recover loss of society because the DOHSA specifically limited recoverable damages to pecuniary losses. The Court refused to supplement the DOHSA damages because Congress had specified the scope of damages in the act.

Nevertheless, in *Alvez*, a plurality of the Supreme Court, relying on *Gaudet*, held that an *injured* harbor worker's wife could recover loss of society damages under the general maritime law. The Court concluded that "[w]ithin this single body of judge-formulated law [i.e., general maritime law], there is no apparent reason to dif-

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[1] As we will discuss in more detail later, unlike Gaudet, who was a longshoreman, the decedent in *Miles* and Mr. Murray, in today's case, were seamen.

ferentiate between fatal and nonfatal injuries in authorizing recovery of damages for loss of society." *Alvez*, 446 U.S. at 281, 100 S.Ct. at 1677.

In *Cruz*, this court was faced with the spouse of an *injured* seaman seeking to recover loss of society damages under the general maritime law. We had to decide whether Cruz's occupation as a seaman required us to deny loss of society damages to his wife even though the harbor worker's wife in *Alvez* could recover those damages. We allowed the wife to recover loss of society. See *Cruz*, 638 F.2d at 725. We found "no more reason to distinguish between the types of workers whose rights stem from the same integral jurisprudence" than the *Alvez* court found to differentiate between degrees of injury. *Id.* at 724.

The Murrays rely on *Alvez* and *Cruz* and argue that *Miles* has not altered them. We disagree. First, *Miles* removed the judicial underpinning of *Alvez* and *Cruz*, on which the Murrays' argument rests. *Miles* specifically limited *Gaudet*—the starting point for *Alvez* and *Cruz*—to its facts. The Court found that the "holding of *Gaudet* applies only in territorial waters, and it applies only to longshoremen." *Miles*, ____ U.S. at ____, 111 S.Ct. at 325, 112 L.Ed.2d at 290. Consequently, *Miles* must have, at least implicitly, placed the same restriction on *Alvez* because that opinion merely extended *Gaudet* to personal injury actions. In fact, Justice Powell, who cast the deciding vote in *Alvez*, wrote that he "continue[d] to believe that [*Gaudet*] was decided wrongly, but [I] recognize[d] the utility of stare decisis in cases of this kind." *Alvez*, 446 U.S. at 286, 100 S.Ct. at 1680 (Powell, J., concurring).

Moveover, our decision in *Cruz* relied on an expansive reading of both *Gaudet* and *Alvez* in holding that an injured seaman's spouse could recover for her loss of socie-

ty. *Miles's* holding that only survivors of longshoremen killed in territorial waters may recover nonpecuniary damages under *Gaudet* has foreclosed, however, such an expansive reading of these two opinions. Therefore, we find that *Miles* has so undercut *Cruz's* foundations as to overrule it or render its precedential value meaningless.

Second, *Miles* espoused a strong deference to Congress and federal maritime legislation. The Court declared that:

> We no longer live in an era when seamen and their loved ones must look primarily to the courts as a source of substantive legal protection from injury and death; Congress and the States have legislated extensively in these areas. In this era, an admiralty court should look primarily to these legislative enactments for policy guidance. We may supplement these statutory remedies where doing so would achieve the uniform vindication of such policies consistent with our constitutional mandate, but we must also keep strictly within the limits imposed by Congress.

Miles, ____ U.S. at ____, 111 S.Ct. at 323, 112 L.Ed.2d at 287. We are required, therefore, to look to the Jones Act to consider the scope of the damage award for a seaman's injury.

In *Miles*, the Supreme Court considered the damage scheme Congress contemplated when it enacted the Jones Act. The Court recognized that while the Jones Act "evinces no general hostility to recovery under the maritime law," *id.* at ____, 111 S.Ct. at 324, 112 L.Ed.2d at 289, courts assume that "Congress is aware of existing law when it passes legislation." *Id.* at ____, 111 S.Ct. at 325, 112 L.Ed.2d at 291. When Congress enacted the Jones Act,

spouses of seamen had no general maritime right to recover for loss of society in unseaworthiness claims. *Stretton v. Penrod Drilling Co.*, 701 F.2d 441, 444 (5th Cir.1983); *Christofferson v. Halliburton Co.*, 534 F.2d 1147, 1149 (5th Cir.1976), *overruled in part by Cruz*, 638 F.2d at 725; *Branton v. Lennard Pipelines*, 1991 A.M.C. 1514, 1991 WL 40263 (E.D.La.1991). Cogress incorporated the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 *et seq.*, unaltered into the Jones Act with this presumed knowledge that no remedy existed for loss of society or other nonpecuniary damages. *Miles* concluded that Congress thereby demonstrated its intent to incorporate the FELA's pecuniary limitation on wrongful death damages into the Jones Act. *See Miles*, ____ U.S. at ____, S.Ct. at 325, 112 L.Ed.2d at 290-91. This reasoning applies with equal force to a seaman's claim for injuries. As a result, the Jones Act limits a seaman's recovery for injury to pecuniary losses and precludes any recovery for nonpecuniary losses, such as loss of society.

The Murrays ask us, therefore, to recognize damages that the general maritime law did not provide before the Jones Act's enactment and that the Jones Act itself did not sanction. We follow *Miles's* reasoning and decline, in this personal injury action, to upset the balance Congress has created in the Jones Act by allowing the recovery of damages Congress did not intend. "It would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially-created cause of action in which liability is without fault than Congress has allowed in cases of [injury] resulting from negligence." *Id.* at ____, 111 S.Ct. at 325, 112 L.Ed.2d at 291.

The Murrays argue next that we should not read *Miles* as precluding a seaman injured in state waters from

recovering non-pecuniary losses. The Murrays point out the anomaly of allowing the harbor worker injured in inland waters to recover nonpecuniary losses but barring the same recovery by the seaman injured at the same location.

We acknowledge the anomaly. This anomaly results, however, from the Supreme Court's decision in *Miles* to limit *Gaudet* to its facts. *Miles* makes it clear that the widow of a seaman cannot recover loss of society whether the death occurs in territorial waters or on the high seas. The same result must follow in injury cases. It would make no sense to conclude that Congress intended one damage scheme for injuries occurring to seamen in state waters and another on the high seas. The Supreme Court's emphasis in *Miles* on the importance of uniformity in remedies in maritime death cases must apply equally to injury actions.

If we recognize Mrs. Murray's loss of society claim, we would create the very sort of anomaly *Miles* sought to avoid. Therefore, we follow the Supreme Court's lead in *Miles* and hold that the spouse of an injured seaman has no cause of action for loss of society under the general maritime law.[2]

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[2] In reaching this conclusion, we observe that since *Miles* a number of district courts have considered the application of *Miles* to general maritime injury actions. Almost every court that has decided this question has held, as we do today, that *Miles* precludes recovery for loss of society. *See, e.g., Duplantis v. Texaco, Inc.*, 771 F.Supp. 787 (E.D.La. 1991); *Dunbar v. American Commercial Barge Lines Co.*, 771 F.Supp. 151 (M.D.La.1991); *Branton*, 1991 A.M.C. 1514; *Breland v. Western Oceanic, Inc.*, 755 F.Supp. 718 (W.D.La.1991); *Anglada v. Tidewater, Inc.*, 752 F.Supp. 722 (E.D.La.1990). But see *Bourque v. Mallard Workover and Drilling Inc.*, No. 89-1502 (W.D.La. July 9, 1991) (not extending *Miles*); *Rayborn v. Zapata Offshore Co.*, No. 90-0467 (W.D.La. May 2, 1991) (same).

IV.

[3] The Murrays also contend that the district court erred in striking their children's claims for loss of society. Having already determined that an injured seaman's spouse has no claim for loss of society, we find no reason to treat a seaman's children differently. As we discuss above, *Miles* emphasized the need to develop a uniform maritime law. It would be anomalous, indeed, to allow an injured seaman's children to recover for the nonpecuniary loss of society but to refuse such recovery to the seaman's spouse.[3] See *Robertson v. Arco Oil and Gas Co.*, 766 F.Supp. 535, 539 (W.D.La.1991) (holding that, in light of *Miles's* limitation of *Gaudet*, a dependent of a longshoreman injured on the outer continental shelf could not recover under the general maritime law for loss of society), *aff'd on othe grounds*, 948 F.2d 132 (5th Cir.1991).

V.

[4] Finally, the Murrays argue that even if we conclude that *Miles* bars the recovery of Mrs. Murray and the children we should not apply *Miles* retroactively under the Supreme Court's test for retroactivity in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-107, 92 S.Ct. 349, 355-56, 30 L.Ed.2d 296 (1971). This court has recognized recently, however, that the Supreme Court's decision last term in *James B. Beam Distilling Co. v. Georgia*, ____ U.S. ____, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991) (*Jim Beam*), has significantly altered the retroactivity analysis. *See In re Luce*, ____ F.2d ____, ____ No. 91-1069, slip op. at 3427 (5th Cir. Mar. 9, 1992); *Sterling v. Block*, 953 F.2d 198, 200 (5th Cir.1992). In *Jim Beam*, the Supreme Court held that

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[3] Even in the absence of *Miles*, we would not recognize the children's claims. *See DeLoach v. Companhia de Navegacao Lloyd Brasileiro*, 782 F.2d 438 (3d Cir.1986); *Madore v. Ingram Tank Ships, Inc.*, 732 F.2d 475 (5th Cir.1984).

"when the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata." *Jim Beam*, 111 S.Ct. at 2448.

Thus, the threshold question we face in determining whether to give *Miles* retroactive effect is whether the Supreme Court applied the rule it enunciated in *Miles* to the parties in that case. *See Sterling*, at 200. This court observed in *Sterling* that:

> In order to conclude that the rule was applied to the original parties, the earlier opinion need not explicitly address the retroactivity issue. Where the court does not explicitly decide the retroactivity question or reserve the question of whether its holding applies to the parties before it, "it is properly understood to have followed the normal rule of retroactive application in civil cases."

Id. (quoting *Jim Brown*, 111 S.Ct. at 2445).

In *Miles*, as we discuss above, the Supreme Court held that the general maritime action for wrongful death of a seaman does not include recovery for loss of society. *Miles*, ____ U.S. at ____, 111 S.Ct. at 328, 112 L.Ed.2d at 294. The Supreme Court, however, did not discuss the retroactivity of its decision or reserve that issue. Nevertheless, the Court affirmed the Fifth Circuit's denial of Mrs. Miles's recovery for loss of society. Consequently, we conclude that *Miles* "followed the normal rule of retroactive application in civil cases" and applied the new rule to the parties before it. *Jim Beam* dictates, therefore, that we apply *Miles* to the parties before us in this case.

For the above reasons, Mrs. Murray's award for loss of society should be stricken. The judgment of the district court is affirmed in all other respects. We remand this case to the district court for entry of judgment consistent with this opinion.

VACATED IN PART, AFFIRMED IN PART, AND REMANDED.